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REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS.

BY

S. J. VAN KOUGHNET, M. A.,
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOLUME XVII.

VAN KOUGHNET--VOLUME III.

CONTAINING THE CASES DETERMINED
FROM TRINITY TERM, 30 VICTORIA, TO MICHAELMAS TERM, 31 VICTORIA;
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

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HENRY ROWSELL.

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J U D G E S
OF THE
C O U R T O F C O M M O N P L E A S .

The Hon. WILLIAM BUELL RICHARDS, C. J.
“ “ ADAM WILSON, J.
“ “ JOHN WILSON, J.

Attorneys General :
Hon. SIR JOHN A. MACDONALD, K. C. B.
“ JOHN S. MACDONALD,

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REPORT OF CASES.

IN THE

COURT OF COMMON PLEAS.

TRINITY TERM, 30 VICTORIA, 1866.

Present:

* THE HON. WILLIAM BUELL RICHARDS, C.J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

DUMBLE V. JOHNSON ET AL.

Devise—Estates tail—Non-registration of deed barring—Effect upon grantor and subsequent grantee, during grantor's life—Non-registration under General Registry Act—Effect on purchaser for valuable consideration.

A testator, seised in fee of land, having devised to one of three sons, “to be by him entailed to any of his issue he may think proper,” with the further provision that if any of the three should die without issue the property should “be divided equally between their successors, subject to entailment,” died before 6th March, 1834. In November, 1837, two of the sons, D. & R., by deed conveyed their estates in the land to the third son, C. This deed was never registered.

C. had a child, which predeceased him.

By several deeds, executed respectively in February and March, 1865, D. and his assignee in insolvency conveyed to plaintiff. Both these conveyances were duly registered.

Held, that the three sons took estates tail in the land; that D. & R. had a contingent interest in fee tail on failure of the issue of C.; and that D., as the heir at law of the testator, had the reversion in fee.

Held, also, that although the deed of November, 1851, may not for want of registration, under C. S. U. C., ch. 83, sec. 31, have barred the entail as against their issue, it did pass the individual rights of the grantors during their lives; and that as D., under whom alone plaintiff claimed, was still alive and could not impeach this deed, no more could plaintiff, who took no higher interest than D. had it then in his power to transfer.

* Was absent from indisposition.

Held, also that if the title had been a registered one before 1851, of which there was no evidence, and if plaintiff had relied on the non-registration of this deed under the General Registry Act, he would, upon proof that he was a purchaser for valuable consideration (as to which, however, the evidence was otherwise), have been entitled to succeed as to that portion of the land which D. himself could have claimed, just as if the deed of 1851 had never been executed.

This was an action of ejectment, brought to recover lot number twenty, in the second concession of the township of Adolphustown.

Johnson, the original defendant, appeared and defended for the whole, and the other defendants, John Philip Dorland and Matthew Ruttan, executors of the last will and testament of Charles Ruttan, deceased, under a judge's order, dated the 1st of October, 1865, were allowed to appear and defend as landlords of the defendant Johnson, and appeared and defended for the whole accordingly.

The plaintiff's notice of title stated that he claimed the land by virtue of a deed from one John Sutherland, assignee of David Ruttan, who derived title thereto under the will of Joseph Ruttan deceased, who claimed under the grantee of the crown.

The plaintiff also claimed by virtue of a deed from the said David Ruttan, who derived title as aforesaid.

The defendant Johnson gave notice that, beside denying the plaintiff's title, he claimed title as tenant of the other defendants, executors of the last will and testament of Charles Ruttan, deceased, who was seised in fee under the will of his father Joseph Ruttan.

The other defendants, beside denying the plaintiff's title, gave notice that they claimed as executors of the last will and testament of Charles Ruttan, who was seised in fee under and by virtue of the will of his father Joseph Ruttan, who derived his title thereto under the grantee of the crown.

The cause was tried before the Chief Justice of Upper Canada, at the last fall assizes held for the county of Lennox and Addington, when the following facts were proved:—

Joseph Ruttan, who was seised in fee, made his will on the 14th of November, 1831, and died, it is said, soon afterwards, in 1831 or 1832.

Joseph Ruttan had several children, and among them David, Richard, and Charles, whose rights were involved in this action.

Daivd was the heir-at-law of his father.

David became insolvent, and in February, 1857, the final order was made, John Sutherland being appointed his assignee in insolvency.

David, by deed of release, or quit-claim, dated the 23rd of February, 1865, for the expressed consideration of \$200, conveyed the land in question in fee to the plaintiff. This deed was duly registered.

David's assignee in insolvency, John Sutherland, by deed, dated the 1st of March, 1865, for the expressed consideration of \$20, executed a release or quit-claim of the same to the plaintiff in fee. This deed was also duly registered.

The operative words in both conveyances were "grant, bargain, sell, transfer and quit-claim all his estate," &c., in the land; and no money or money's worth was shewn to have passed in either case.

Richard Ruttan, son of Joseph, died in 1864, leaving three children, who were living.

Charles Ruttan, son of Joseph, had an only child, which died a month before its father.

Charles made a will, dated the 19th of June, 1856, and died in July of the same year.

These wills and deeds were put in at the trial, and also a deed, dated the 19th of November, 1851, between Richard Ruttan, of the first part, Charles Ruttan, of the second part, David Ruttan of the third part, Elizabeth, the wife of Richard, of the fourth part, and Elizabeth, the wife of David, of the fifth part.

By this deed Richard and Charles conveyed the rear half of nineteen, in the first concession of Adolphustown, to Richard in fee; Charles and David conveyed number nineteen, in the second concession of Adolphustown, to Richard in fee; and Richard and David conveyed number twenty, in the second concession of Adolphustown [the premises in question in this cause], to Charles in fee.

The wives of Richard and David joined for the purpose of releasing their dower.

This deed had not been registered.

The facts of Joseph's will material to be noted were the following :

By the second clause the testator devised to his son Peter lot number thirty-two, in the fifth concession of Thurlow, "to him, his heirs and assigns' own use, forever."

By the third clause he devised to his son John lot number forty-six, in the sixth concession of Camden, "to him, his heirs and assigns, forever."

By the fourth clause he devised to his "son William, his heirs or assigns, for ever," lot number twenty-three in the fifth concession of Murray.

By the fifth clause he devised to David the rear half of lot number nineteen, in the first concession of Adolphustown, "to be by him entailed to any of his issues he may think fit."

By the sixth clause he devised to Richard lot number nineteen, in the second concession of Adolphustown, "to be by him entailed to any of his issue he may think proper." The will then proceeded :—

"*Seventh.*—I give and bequeath unto my son Charles Ruttan lot number twenty, in the second concession of the township of Adolphustown, "to be by him entailed to any of his issue he may think proper."

"*Eighthly.*—If any of my before mentioned sons, David, Richard, and Charles, die without issue, then it is my wish that the property before mentioned be divided equally between their successors, subject to entailment."

A verdict was found for the defendants, with leave to the plaintiff to move to enter the same for him, if the court, upon the evidence, should think he was entitled to succeed.

In the following Michaelmas Term *H. Cameron* moved for and obtained a rule *nisi* accordingly.

In the ensuing Hilary Term, *A. Kirkpatrick*, for the defendants, shewed cause :—

The defendants contend that Charles Ruttan, under whom they claim, as the devisee of Joseph Ruttan, took an

estate in fee as such devisee. The title from Charles is not disputed.

If Charles did take the fee under Joseph's wife, the defendants are entitled to succeed; and if he did not, then, on Charles' death, the whole fee simple, it is said, became vested in David Ruttan, as the heir general of the common ancestor, Joseph Ruttan, and the plaintiff will be entitled to recover.

The question as to what interest Charles took under Joseph's will arises upon the seventh and eighth clauses of the will. *Earl of Tyrone v. Marquis of Waterford*, 1 DeG. F. & J. 213, shews the meaning of the term "successors."

H. Cameron, contra:—

Joseph's will created estates in tail in the three sons, with cross remainders.

By the Consolidated Statutes of Upper Canada, ch. 83, sec. 31, a deed made by a tenant in tail must, to affect the reversion, be registered within six months after its execution.

The plaintiff is a purchaser for value.—*Phelan v. Graham*, 22 U. C. Q. B. 380.—Charles can only be held to have taken the fee, by striking out altogether the eighth clause of Joseph's will; but that cannot be done, because some effect can be given to that clause, and that effect is to create estates in tail and cross remainders.—*Taylor v. Walker*, 12 L. T. N. S. 793, S. C. 11 Jur. N. S. 783; *Heron v. Walsh*, 3 Grant. 606; *Jarman on Wills*, Ed. 1861, II. 253, 328, 387, 416.

A. WILSON, J., delivered the judgment of the court.

As this is a will made and taking its effect before the 6th of March, 1834, [Consol. Stat. U. C. ch. 82, sec. 12], it has to be considered and interpreted under the law as it was before that day; and nothing, it is said, is better settled than that a devise of lands, without words of limitation, by implication or otherwise, will confer on the devisee an estate for life only.

The seventh and eighth clauses of the will do shew plainly that David, Richard and Charles, respectively, took estates

in tail; for the lands are not only devised severally to them, to be by them entailed to any of their issue they may think proper, but provision is made in case any of them die without issue that his share is to be divided equally between their successors, subject to entailment.

The other two brothers, David and Richard, had a contingent interest in fee tail; on failure of the issue of their brother Charles; and David, as the heir-at-law of his father, the devisor and creator of the entail, had the reversion in fee.

By the deed of the 19th of November, 1851, David and Richard gave up their estates in the land in question to Charles; and although the deed may not, for want of registration under ch. 83, have barred the entail in which their issue were interested, it did at all events pass the undivided rights of the grantors, binding upon them during their lives.

This is sufficient to dispose of the case; for as David, under whom alone the plaintiff derives his title, is still living, and as he cannot impeach the deed of 1851, so neither can the plaintiff, who took no higher interest than David had it then in his power to transfer.

. If this had been a registered title before 1851, of which there was no evidence given at the trial, and if the plaintiff had relied on his non-registration of the deed, under the General Registry Act, he would, upon establishing that he was a purchaser for valuable consideration, have been entitled to prevail for that portion of the land which David himself could have claimed, as if the deed of 1851 had never been made.

It was not, however, proved that this was a registered title when the deed of 1851 was made; nor was any objection taken to the want of such registration. Upon either of these grounds the plaintiff, who derives his title under the posterior conveyance, must therefore fail.

But if the plaintiff could have discussed these questions, he would nevertheless fail, we think, because it appears from the evidence that the plaintiff was not a purchaser for valuable consideration, and is not entitled to any priority of claim by reason solely of his earlier registration.

Rule discharged.

NATHAN FIELDS V. JOHN LIVINGSTON, THE YOUNGER, AND
GEORGE WIGHTMAN.

*Ejectment—Notice of title—Amendment in refused—Alterations in will—
Sheriff's sale—Deed made six years after—Secondary evidence of such deed.*

In ejectment the plaintiff, by his notice, claimed as devisee of F., defendant under a sheriff's deed to one M., upon a *fi. fa.* against F.'s land. Defendant having proved such deed, *Held*, that the plaintiff could not in answer, under his notice, rely upon twenty years' possession held by him subsequently; and defendant having been in possession eighteen years, the court refused to allow an amendment of plaintiff's notice.

In the will the number of the lot devised had been altered from eighteen to seventeen, the former number having been struck out and the latter written over it. The alteration was in the same handwriting as the will, and at the foot of the will, before the attestation clause, was a note in the same hand, "the word seventeen being the true number of the said lot." It was proved that the testator owned only lot seventeen: *Held*, that the plaintiff was bound to shew that the alteration had been made before execution, but that the jury might infer it from these circumstances; and, *Semble*, that the note should be treated as part of the will. The sheriff's deed was not produced, and, after giving evidence of a search, which the court held sufficient, defendant, in order to prove it, put in an exemplification of the judgment against F. and of the *fi. fa.* goods returned *nulla bona*, and he produced the *fi. fa.* lands found among the papers of the sheriff, since deceased, with a memorandum annexed, written and signed by the sheriff, stating that this lot had been sold at sheriff's sale, 11th December, 1824, for £125, to M., who had paid the sheriff's fees. The *Gazette* containing the advertisement of the sale of this lot on that day under the execution was also produced. A memorial was then produced from the registrar's office, of a deed dated 16th December, 1830, by which the sheriff, in consideration of £125, granted F.'s interest in this lot to M. Possession had not been taken under the alleged deed till eighteen years afterwards, but it had gone for the last eighteen years in accordance with the title derived through it: *Held*, that the sheriff could, in 1830, make a deed under the sale of 1824, notwithstanding the debtor's death; and that the evidence was sufficient to establish such deed.

Variance between the amounts in the judgment and *fi. fas.* were held immaterial, as they could not avoid the sale.

This was an action of ejectment, brought to recover lot number seventeen, in the first concession, and fronting on the river Thames, in the township of Harwich, in the county of Kent, containing two hundred acres.

The plaintiff, in his notice of title, claimed as devisee under the will of Nathan Fields, deceased, who was the patentee of the crown. The will bore date the 23rd of March, 1820.

The defendant Wightman, in his notice, besides denying the title of the claimant, asserted title in himself, as mortgagee, under an indenture of mortgage made by one John

Livingston, who was the owner in fee, and also, by leave of the court, by length of possession.

The defendant John Livingston, the younger, besides denying the plaintiff's title, claimed title in himself by deed from John Livingston, who was the grantee of George Wightman, the grantee of Samuel Gerard, the grantee of William McCrea, who purchased the said lands from William Hands, sheriff of the Western District, under an execution against the said Nathan Fields, deceased, who was the patentee of the said lands.

The cause was taken down to trial at the assizes for the county of Kent, held in the spring of 1866, before *Morrison, J.*

The plaintiff put in an exemplification of the patent for the lot to Nathan Fields. The patent was dated 10th of August, 1801. He also proved that Fields died in possession.

George Fields, a son of Nathan, stated that the instrument produced was the will of his father. He saw it the day after his death. He proved the handwriting of the witnesses, who were dead. It was dated 23rd of March, 1820. After he saw it his mother got it, he said. Lot seventeen was the only land in his father's possession at the time of his death, which took place in August, 1824. His mother died four or five years ago. Plaintiff was with her at the time of her death.

The will purported to devise all the lands, &c., of which he might die possessed, in the following manner: "I give and bequeath to my wife Ann and my son Nathan (so long as she remains my widow) lot number seventeen, first concession, township of Harwich, in the county of Kent, with all the rents, issues and profits thereof, for and during her life, and then to devolve to my son Nathan, his heirs and assigns forever: and all the rest, residue and remainder of my lands, goods and effects whatsoever, I bequeath to my six sons and three daughters equally, share and share alike, after the death of my wife: and I do hereby nominate and appoint my son George and my son Daniel executors to this

my last will and testament, hereby revoking all former will and wills by me heretofore made.

"In witness whereof I have hereunto put my hand and seal, at Dover, this twenty-third day of March, in the year of our Lord one thousand eight hundred and twenty.

his

"NATHAN + FIELDS. [L. S.];
mark

"the word seventeen being the true number of said lot."

These last words were written at the bottom of the page in the original will: on the other side,

"Signed, sealed, published and declared by the within named Nathan Fields, as and for his last will and testament, in the presence of us, who have hereto subscribed our names as witnesses thereto, in the presence of the said testator and in the presence of each other.

"(Signed) HEZEKIAH WILLCOX.
" ELISHA WILLCOX.
" JOHN DOLSEN."

The will was evidently in the handwriting of Mr. Dolsen, who was well known in that part of the country as a person quite capable of preparing wills, and esteemed a man of high character. There was an alteration in the number of the lot from eighteen to seventeen undoubtedly in his handwriting, as was also the memorandum at the foot of the page, that seventeen was the true number of the lot.

The defendants' counsel objected that the will could not be read, as the alteration had not been sufficiently accounted for.

The learned judge allowed the will to be read.

It was further proved that the testator's wife and son, the plaintiff, lived on the land, from the testator's death in 1824 until 1847 or 1848. Plaintiff lived there nearly all the time, and for more than twenty years after his father's death.

The old lady cultivated the cleared part of the land after her husband's death.

The defendants' counsel, at the close of plaintiff's case,

objected that the will only properly referred to lot number eighteen.

This was overruled.

Defendants then put in an exemplification of judgment, in the court of King's Bench, between William McCrea, acting executor of the last will and testament of Thomas McCrea, Esquire, deceased, and John Dolsen, Esquire, acting executor of the last will and testament of Matthew Dolsen, against Nathan Fields, in an action of debt for £356 16s. 4d., in which judgment was entered on the 15th of May, 1823, for the said debt, and £129 15s. 9d. for damages, and £39 2s. 8d. for costs, in all £168 18s. 5½d.

They also put in an exemplification of *fi. fa.* against goods, tested the 3rd of May, (4 Geo. IV.) in a suit between the same parties, directed to the sheriff of the Western District, commanding him to levy of the goods and chattels of Nathan Fields, as well a certain debt of £356 15s. 9½d., which McCrea, executor of McCrea, and Dolsen, executor of Dolsen, had recovered against him, as also £168 18s. 5d., awarded to them for their damages sustained as well for detaining the debt as costs taxed and charges by them laid out in and about their suit in that behalf, whereof Fields was convicted, as appeared of record, and to have that money at York on the first day of Trinity Term, to render, &c.

The writ was endorsed to levy £168 18s. 5½d., with interest from 15th of May, 1823, 16s. 6d. for writ, besides sheriff's fees. It was filed with the sheriff on the 26th of May, 1823, and returned *nulla bona* on the 20th of November, 1823. The *fi. fa.* goods was filed in the crown office, with a *præcipe* for *fi. fa.* lands.

They also produced a *fi. fa.* lands, tested 15th of November, (4 Geo. IV.) addressed to the sheriff of the Western District, commanding him that of the lands and tenements of Nathan Fields he should cause to be levied as well a certain debt of £356 15s. 9½d., which William McCrea, executor of Thomas McCrea, and John Dolsen, executor of Matthew Dolsen, had recovered against him, as also £168 18s. 5d., which was awarded to the said William McCrea and John

Dolsen, executors, &c., as aforesaid, for their damages, as well for detaining the debt as for their costs and charges by them laid out about their suit in that behalf, whereof Fields was convicted, as appeared of record. This writ was returnable on the first day of Hilary Term, 1825.

The *fi. fa.* was endorsed by the sheriff as received the 6th December, 1823, and it directed him to levy £169 14s. 11½*d.*, with interest from 15th May, 1823, and £1 10s. for the sheriff's fees on the former writ, and 16s. 6*d.* for that writ, besides sheriff's fees.

On a piece of paper attached to this writ was a memorandum, in the handwriting of the late sheriff Hands, as follows:—

“Lot No. 17, 1st con., Harwich, sold at sheriff's sale, 11th December, 1824, to William McCrea, Esq., for £125, sheriff's fees paid by William McCrea, Esq.

(Signed) WM. HANDS, *Sheriff.*”

The official *Gazette* was produced, containing an advertisement dated 9th December, 1823, in which the sheriff recited that by virtue of this execution he had seized, as belonging to Nathan Fields, lot No. 17, in the front concession of the township of Harwich, containing 200 acres of land, with dwelling, &c., which he would sell by auction at his office, near the town of Sandwich, on Saturday, the *eleventh day* of December then next, at 12 o'clock, noon, for cash only. This notice was published in the six numbers of the official paper from June 3 to July 8, 1824, both days inclusive.

Evidence was called to prove a search amongst the papers of sheriff Hands, now in the possession of his grandson, for papers relating to this case.

The original *fi. fa.* against lands, with the memorandum attached to it, was found, but no deed or other entry relating to the lands, or the suit in which they were sold. The handwriting of the sheriff to the memorandum attached to the writ was also proven, as also the endorsement of the plaintiff's attorney on the writ. The son of the plaintiff's attorney, Mr. Woods, proved a search amongst his father's papers,

but he could find no paper in the cause, nor any deed from the sheriff of the lands in question, amongst his father's papers.

Thomas McCrea, son of the late William McCrea, and one of his executors, proved an ineffectual search amongst his father's papers for a deed from sheriff Hands to his father of the land in question. His father claimed to own the land, and he was present when Mr. Lewis, sheriff Hands' deputy sheriff, put his father in possession of the land about 1825, in the summer time. The deputy sheriff with the witness went to the place, and the latter told Mrs. Fields he came there to give possession of the lot to William McCrea.

Mrs. Fields said they must carry her out. The deputy sheriff lifted the chair and carried her out. They were taking possession under an ejectment at that time. He could not say he ever saw the sheriff's deed. He was then 18 years old. They left old Mrs. Fields in the yard. He did not know there was any action of ejectment brought. There were no goods removed from the premises to his recollection, and they went away immediately. He knew nothing more of his father's taking possession.

The registrar of the county proved a search in his office, and that he found an original memorial recorded 17th December, 1830, by John Dolsen, deputy registrar, purporting to be of a deed from William Hands, of Sandwich, sheriff of the Western District, to William McCrea, dated the 16th day of December, 1830, whereby Hands, in consideration of £125, to him in hand paid by McCrea, granted, bargained, sold and conveyed to McCrea in fee simple lot number 17 in the first concession of the township of Harwich, in the county of Kent, containing 200 acres more or less, describing it by metes and bounds, shewing it to be situate on the bank of the river Thames; and also all the estate, right, title, interest and claim, property and demand whatsoever, of Nathan Fields, or any other person or persons, or his or their heirs, claiming or to claim by, from, or under him, them, or any or either of them, to the premises, or any part thereof, which he, the said sheriff, by virtue of the authority

in said deed mentioned, might or could grant or convey, in anywise howsoever ; which said deed was witnessed by Joseph Woods, of the town of Sandwich, gentleman, and John Hands, of the same place, gentleman, and was required to be registered by the grantee in the said deed named. This memorial was signed by the grantee in the presence of one witness.

At the close of the defendant's case the plaintiff objected that there was no *fieri facias* against goods or lands proved warranted by the judgment given in evidence, and *vice versâ* ; that the judgment was proved for one thing and the words of execution for another, and the amounts stated to be recovered were different from those named in the judgment ; that the proceedings by the sheriff and sale by him, if proven, were illegal ; that there was no sale proved, and at the alleged time of the sale it was too soon to effect a valid sale ; that the advertisement of the sale was not sufficient ; that the memorial proved nothing, there being only one witness to it ; that it bore date 20th December, 1830, was registered on 17th December, 1830, and the affidavit of the execution of the deed and memorial appeared to have been made on the 22nd December, 1830 ; that it did not shew a sale or conveyance of the lot in question ; that the memorial was of a deed for lot No. 17 in the 1st concession, whereas the land was 17 in 1st concession, fronting on the river Thames ; that the memorial was no evidence of a sale ; that there was no evidence of a change of possession accompanying or in accordance with the deed.

The plaintiff also desired to amend his notice, by claiming title as having been in undisputed possession for more than 20 years.

It was agreed a verdict should be entered for defendants, with leave to the plaintiff to move to enter a verdict for him, if the court should be of opinion that plaintiff was entitled to succeed.

In Easter term last *Becher. Q. C.*, obtained a rule *nisi* calling on the defendants to shew cause why the verdict for

them should not be set aside, and a verdict entered for the plaintiff, pursuant to leave reserved:

1. Because no judgment or *fi. fa.* against lands was proved, upon which to base the sale and sheriff's deed of the premises under which the defendants claimed.

2. Because secondary evidence of the existence or execution of such deed was improperly received, and was insufficient and improper.

3. Because there was no proof or sufficient evidence of the execution or existence of any such deed, and the memorial in evidence was not a memorial under the Registry Act, and did not refer to any deed made under process; and for all that appeared therein, the deed, of which it was a memorial, would pass only any private estate of the grantor.

4. Because the deed (if any there were) did not pass the estate Nathan Fields died seised of.

5. Because, if any estate passed to the sheriff's vendee, he and those claiming through them were divested of it by the adverse possession of the widow of Nathan Fields and the plaintiff for upwards of twenty years.

6. Because the plaintiff was entitled to recover on the case made and proofs produced by him, and the defendants failed.

Or why there should not be a new trial between the parties, with leave to the plaintiff to amend his particulars of claim of title to the premises, by adding thereto a claim by long possession of twenty years and upwards, if such addition should be necessary for the plaintiff's recovery; or why such amendment should not be made on the argument of this rule as was moved for at the trial.

C. Robinson, Q. C., shewed cause.—Alterations in a will are presumed to have been made after the execution of the will, unless the contrary be distinctly shewn.—*Taylor on Ev.*, 4th Ed. 163; *Doe Shallcross v. Palmer*, 16 Q. B. 767; and the mere fact of its having been shewn that the testator owned no other land in the township of Harwich than the lot mentioned in the alteration or memorandum at the foot of the page is not a sufficient explanation of the alteration,

or of the time of making it, to render the will admissible in evidence: *Simmons v. Rudale*, 1 Sim. N. S. 136; *Doe Latum v. Catomore*, 16 Q. B. 745.

The memorandum which is annexed to the *fi. fa.* against lands—

“ Lot No. 17, 1st Concession, Harwich,

Sold at sheriff's sale, 11th December, 1824, to William McCrea, Esq., for £125,

Sheriff's fees paid by William McCrae, Esq.

W. HANDS,
Sheriff”—

and which is in the sheriff's writing, was received at the trial, and was rightly received, because it was an entry in the course of the business of his office, and an entry also against interest (*Higham v. Ridgway*, 10 Ea. 120), both as respects his liability for the £125 and his acquittance to the purchaser for his fees.

This memorandum, and the possession which was given by the sheriff to the purchaser of the land in 1825, as a purchaser, were sufficient facts from which a deed from the sheriff might be presumed, independently of the memorial altogether: *Regina v. Fordingbridge*, El. Bl. & El. 678; and the memorial of the deed which was produced from the Registry office rendered the proof conclusive of the fact of such a deed having been made. It is of no consequence as to this point that the memorial, because it has only one witness to it, is a defective instrument for the purposes of registration: it is still admissible as evidence of the fact for which it was produced.—*Lynch v. O'Hara*, 6 U. C. C. P. 259. It was not objected that the memorial should not be received, because the possession had not gone along with the deed.—*Gough v. McBride*, 10 U. C. C. P. 166; *Russell v. Fraser*, 15 U. C. C. P. 380; *Taylor on Evidence*, 4th Ed. 413; *Doe Jenkins v. Davies*, 10 Q. B. 314. But it was objected that the memorial was so defective on its face that it could not be received at all. It is dated, and its execution is sworn to on the 22nd of December, 1830, while it is certified to have been recorded on the 17th of December, 1830, or

five days before it was made; and it is said that this at any rate prevents its being received.—See the 35th Geo. III., ch. 5, secs. 4 and 5.

It is next argued that, if the title derived from the sheriff be made out, it has been defeated by the long possession of the plaintiff and of others from whom he claims since the sale was made, and since the sheriff attempted to put the purchaser into possession; but the plaintiff is not at liberty to set up this possession, because he has not relied upon it in his notice of claim.—*The Canada Co. v. Weir*, 7 U. C. C. P. 341; *Hill v. McKinnon*, 16 U. C. Q. B. 216; *McKinley v. Bowbeer*, 11 U. C. Q. B. 86; *Doe King's College v. Graham*, 1 U. C. Q. B. 158. No objection can be raised that the sheriff made his deed after the death of the judgment debtor, for the sheriff is bound to complete an execution after the debtor's death which had been begun in his lifetime.

The plaintiff was not entitled to have his notice of claim amended, nor should it be amended now after so long a possession adverse to him.

Becher, Q. C., contra.—The presumption that an alteration in a will has been made after its execution, arises only where there is no evidence of a contrary presumption appearing, and there is such contrary evidence here on the very face of the will, by the memorandum which was made by the writer of the will.

The case of *Doe Shallcross v. Palmer* was a decision under the Imperial Wills Act of the 2nd Victoria, and is not precisely applicable in this country.

The plaintiff is still entitled, if he cannot take under the special devise, to a one-sixth share under the general devising clause.

There was not sufficient evidence given to justify the admission of secondary evidence of the sheriff's deed, and that which was given was not sufficient for the purpose, and should not have been received or acted upon. The memorial should not have been admitted: *Russell v. Fraser*, 15 C. P. 380. This document should not have been received

as a memorial, because of the discrepancies on its face, and because there was only one subscribing witness to it. It was not necessary the plaintiff should have given notice of his claim by length of possession.—Kevrin v. Davourneen, 12 Ir. Chy. Rep; Smith v. Nevilles, 18 U. C. Q. B. 473; but if it were necessary, the amendment should have been made at the trial, or should be made now.

A. WILSON, J., delivered the judgment of the court.

If the plaintiff had relied, in his notice of claim, upon his title by length of possession, he might perhaps have succeeded, and none of the other questions would have arisen; but he has not done so, and he contends that he was entitled to the benefit of this additional claim, although he did not include it in his notice.

There are two kinds of possessory claims under the law of limitation; one, by which the party either has in himself alone, or in himself and by those through whom he claims, such a length of possession that a legal and marketable title has thereby been acquired by the occupant, and the right of the owner has become extinguished; the other, by which an extinguishment alone has been effected without any more than the mere possessory title vesting in any one.—Doe dem Jukes v. Sumner (14 M. & W. 39), Doe dem Carter v. Barnard, 13 Q. B. 945).

If the party *claim title* by length of possession, he must no doubt state the claim in his notice, whether he be plaintiff or defendant; otherwise he will be precluded from setting up such a claim at the trial.

A defendant, however, who does not *claim title* by length of possession, but who contends that the plaintiff's title has been extinguished by the period of limitation, may rely upon this by way of defence without notice, whether the title be vested in him or not; because he is at liberty to defeat the plaintiff's right by any means, although he set up no title to the land himself.

This defence the plaintiff may answer by any counter evidence which shews that his title has not been extinguished

by length of time; and for this purpose he may shew that he has had possession in fact, or in law, until a period within twenty years from the commencement of the action; but he cannot rely on his mere possession, as a matter of *title*, as a ground of recovery, unless he has given notice of it according to the statute.

Suppose the plaintiff in an action of ejectment to have been the patentee of the crown, and to have sold the land to the defendant; and then to have remained more than twenty years in possession; and in his notice of claim to have laid his title under the patent from the crown, and under the patent alone; and that the defendant gave notice that he claimed title under the deed to him from the plaintiff; and that the patent and the deed were both proved;—I have no kind of doubt that the plaintiff could not set up at the trial his possession since the deed, for the purpose of defeating it; because he had parted with his patent or paper title when he made the deed, and the only title he really had after making it was under the Statute of Limitations. That is therefore the title which he should have set up, and not his former one as patentee of the crown; for it had been determined by his own conveyance. *M'Kinley v. Bowbeer* is quite to the purpose on this point.

If the plaintiff had made a lease, and afterwards taken a surrender, I should think he need not mention this surrender in his notice of claim; because, by reason of the surrender, he is in possession of his former estate; but if he had taken an underlease, I think he should rely upon it specially in his notice, because it is by it alone he is entitled to the possession which he demands.

In the present case, if the plaintiff's title as devisee be answered, he cannot be allowed to set up his possession of twenty years, either to repel the defendants' title, or to set up a new one for himself.

The statute prevents him from setting up any other title than that which he has given notice of; and it does not follow, although he do rebut the defendant's *title*, that he thereby establishes one for himself; and it is upon his own

title he must recover, and not upon the want of one in the defendant. Orser v. Vernon (14 U. C. C. P., 572) also determines this point.

In every way of considering the case, I think the title by length of possession should have been specially set out in the notice, and as it was not the plaintiff could not give evidence of it; and, I think, also, that after so long a period as 18 years of possession against himself by the defendant, it would not have been a reasonable amendment to have made at the trial; and if we have this power to make it now, it is a power we should not exercise in his favor.

We do not say whether the claim by possession could have been successfully maintained if it had been in issue: it will be better to consider it if the question should ever arise.

The next question is, whether the plaintiff sustained his case as devisee under his father's will, either to a one-sixth share or to the whole of it.

This depends upon the effect of the alteration of the will; or, if the alteration be disregarded, upon the right of the plaintiff to have the number of the lot *eighteen* in the will read as *seventeen*, upon the facts which were proved at the trial, as if no such alteration had ever been made.

It is very clearly settled, as appears by the case of Doe Shallcross v. Palmer, cited on the argument, that any alteration in a will is presumed to have been made after its execution, unless the contrary be proved. The alteration here is in striking out the number eighteen in the body of the will, and writing the word seventeen over it; and there is no doubt the person claiming seventeen was bound to prove it had been done before the execution of the will. The evidence respecting it was, that the testator did not own number eighteen, or any other lot, in the township of Harwich, than the substituted lot number seventeen, and that a note of the alteration is made at the foot of the first page of the will in the writing of the person who wrote the will, and before the attestation clause, which is written over the page. The note is, "the word seventeen being the true number of said lot."

Now does this, aided by the inspection of the will, prove that the alteration was made before it was attested by the witnesses?

The memorandum made at the foot of the page is so written that it may have been inserted between the body of the will and the attesting clause, as well after as before the will was attested. It does not fill a space, from which it would necessarily be presumed that it does fill it, because the space was intended for it: it is written on a space too small for the attesting clause, and therefore likely to have been left vacant, the attesting clause having been carried over to the back of the sheet, where there was full room for it.

The fact that the testator did own lot No. 17 and did not own lot 18, or any other lot but 17, in the township of Harwich, is a strong circumstance to be considered in support of the presumption of the change having been made before the execution. The fact that he did mean to give his wife and his son Nathan an exclusive interest in some lot in the front concession of Harwich is manifest; and the fact that he could not give them lot 18, but could give them lot 17, may also be presumed to have been present to his mind; and the fact that it was quite indifferent to him whether it was lot 18 or lot 17 which he gave them, so long as it was a lot which he had really the power to give them, are circumstances from which the presumption of the prior alteration might be raised.

In *Cooper v. Bockett* (7 Jur. 681), in the Prerogative Court, Sir *H. Jenner Fust* decided that a will had been signed by the testator before the attestation by the witnesses, contrary to the recollection of the witnesses themselves; and, in coming to this conclusion, he said: "Looking to the face of the paper, it seems to me that the signature 'R. H. S. Cooper' was written at the same time as the latter part of the will: it is apparently written with the same coloured ink, and it appears as if the deceased had first written the words 'witnesses to the will' and afterwards written below these words 'signature,' although I do not know what he meant by adding this word."

When the case was in appeal (10 Jur. 931) as to the *factum* of the will, the Privy Council affirmed the due execution of the will, upon the circumstances of the case and the appearance of the will; but as to the alterations in the will (p. 935), the Privy Council reversed the decision of the court below (3 Curteis 648), acting upon the rule that alterations in a will, if not shewn to have been made before, must be presumed to have been made after, the execution of the will.

The court said, as to the surrounding facts: "The alterations are most material. They amount, indeed, to reversing the whole will; for the entire will is a gift of the legacies subject to certain annuities, and the first alteration is an entire change of the residuary legatee, and the last is an erasure of one of the annuities. Can anything be more clear than that we ought to know whether the testator executed and the witnesses subscribed this will as it now exists, or a former will?"

If the note at the bottom of the page be a part of the will, inserted there by way of explanation of the change, or can be treated as having been there when the will was executed, it will be quite plain that the alteration has been fully accounted for, and the substituted number will be the proper lot.

A devise of all my *freehold* lands in Aldersgate street will carry leasehold lands, the testator having had no other lands there than leasehold—*Leay v. Trig* (1 P. Wms. 287).

A devise of land in the parish of Billing, and in a street there called Brook's street, when there was no such *parish* as Billing, and the land lay in *Billing* street, was *held* to pass the land in Billing street.—*Pacy v. Knollis* (Brownl. & Gold. 131).

The general result of the cases is stated in 1 Jarman on Wills (3rd ed. 755) as follows: "Sometimes the application of the principle in question is embarrassed by the circumstance that the terms of description, though not applicable to any property of the testator, precisely answer to the pro-

perty of some other person ; for instance, a testator, having a manor called North Dale, in A., devises his manor called South Dale in A. Now, supposing that there were in A. no manor of South Dale, the authorities would authorize the application of the devise to the manor of North Dale. But, if it should turn out that there was in A. a manor called South Dale, belonging to some other person, it might be contended that the testator conceived himself to have some devisable interest in the manor of South Dale, and intended to devise that interest, or, in respect of wills operating under the recent statute, he might have contemplated the subsequent acquisition of a devisable interest in such manor."

Upon the whole, we think that, whether the case be considered as one of mere alteration, or as accompanied with the note referring to it, and which, as the case stands, we must take to have been a part of the will, there was evidence from which the jury might infer the substituted number of the lot was put there before the attestation of the will was complete.

The plaintiff's case was, therefore, proved *prima facie*.

The next consideration is, whether the defence was proved. This depends upon whether the defendant proved a valid sale and conveyance of the land by the sheriff to William McCrea. The judgment roll shews a claim in debt of £356 16s. 4d., and a judgment for the said debt, and for the damages £129 15s. 9½d., and for costs £39 2s. 8d., which damages, costs and charges, on the whole, amount to £168 18s. 5½d.

The *fi. fa.* against goods is to levy a debt of £356 15s. 9d½, and for damages and costs £168 18s. 5½d., and the *fi. fa.* against lands is in the same amounts.

The debt, therefore, of £356 16s. 4d., is made in the executions £356 15s. 9½d, and the damages and costs, of £168 18s. 5½d., are made in the executions £168 18s. 5d. There is six pence half-penny error in the debt, and a half-penny error in the damages and costs. It is not the amount, however, that is of consequence : it is that there is a variance

by which, it is contended, it appears that there is no such judgment as the writs recite.

Upon *nul tiel* record the party pleading these writs would fail because of the variance.—Coy v. Hymas (2 Str. 1171). The writs, however, might be amended.—Noble v. Chapman (14 C. B. 400); Hunter v. Emmanuel (15 C. B. 290); Cornish v. Hockin (1 El. & Bl. 602); Leigh v. Baker (2 C. B. N. S. 367).

Notwithstanding the irregularity of the writs, or even if the judgment itself were reversed, the sale under the execution is not void, and restitution in specie would not be ordered, but in value only; and a term sold under an irregular *fi. fa.* cannot be recovered back upon the *fi. fa.* being set aside.—Doe v. Thorn (1 M. & S. 427).

If an elegit, however, be set aside, or the judgment on which it is founded be reversed, the goods or lands which were delivered to the judgment plaintiff will be restored, because the delivery did not alter the property absolutely.—Goodyere v. Jones (Cro. Jac. 246, Yelv. 179.)

I do not consider the sale can be avoided by the irregularities which have been mentioned. The defendant in this case need not have produced the judgment. The production of it enabled these irregularities to be seen. The writs either issued upon this judgment or they did not: if they did, they are only irregular and do not avoid the sale: if they did not, then there is no evidence they are irregular.

The next question is, Did the sheriff make a valid sale? He received the writ against lands on the 6th of December, 1823. He advertised the lot number seventeen in June and July, 1824, for sale, and the sale was made on the 11th of December, 1824, but no deed was made by him until the 16th of December, 1830.

By the seizure the sheriff obtained no property in the land, and by the sale he passed no estate to the purchaser. A deed was necessary to transfer the title, and until that deed was made, the estate in the land continued to be in the execution debtor.—Lord Anglin v. Jones (9 M. & N. 372).

We are not prepared to say that the sheriff could not, in 1830, make the deed of land he had sold in 1824. The debtor at this latter date was dead, but his estate was not otherwise varied than by the devise of it to his widow and son, as before mentioned. The facts and causes of the delay have not been stated; and, as a mere abstract proposition of law, we cannot say that such a delay as this deprived the purchaser of his right to have a conveyance made to him. The sale and consideration for it are the essential particulars in a court of equity: the deed is considered to be only a formal part of the transaction: a necessary part, no doubt, to confer a title, but a formal part notwithstanding. Now, it would be unjust to deprive the purchaser of his substantial acquisition, because he had omitted to observe the formalities usual and necessary firmly to secure it; and, we think, we are not going too far in refusing to disturb the deed in question.

We think a proper search was made to let in secondary evidence of the missing deed, if one were made. This is not so strongly disputed; but it is contended that the evidence which was produced was not admissible, and, even if it were, that it did not establish the existence of the deed.

In the case of *Regina v. Fordingbridge* it was decided, that proof by a person that more than sixty years before he worked with the same master as the pauper, and always believed him to be apprenticed to that master; that the pauper was instructed there by a journeyman, and lodged and boarded in the house with two others who were apprentices, was evidence from which a settlement by apprenticeship of the pauper under an indenture might be presumed.

Lord *Campbell*, C.J., said: "Marriage, the most important of all contracts, is often presumed from circumstances. If we presume a contract, we may presume that all proper requisites to it have been performed. The general rule [referring to the words of *Bayly*, J., in *Rex v. St. Marylebone* 4 D. & R. 475] applicable to the doctrine of presumption is, that we are to presume that which reasonably accounts for the actual existing state of things. Now, here

is a state of things which can reasonably be accounted for by supposing the existence at one time of an indenture of apprenticeship, and not by any other supposition. In *Rex v. Marylebone*, as in this case, there was no evidence *aliunde* of the existence of the indenture.

Erle, J., said: "Partnership is often presumed from circumstances which are nevertheless consistent with other relations, such as that of principal and agent, between the parties. I know of no rule of law requiring technical proof of the existence of an indenture of apprenticeship, or of any other deed, or which prohibits the presumption of the existence of the deed from circumstances. The relations of landlord and tenant, of partnership, of marriage, are frequently presumed from the conduct of parties being consistent with that state of things, and more consistent with that than with any other."

Are the facts, then, in the present case consistent, and more consistent with the fact of the sheriff having made a deed to McCrea, the purchaser, than with the fact that he did not make one? The sheriff was commanded by process to sell the land. He advertised it for sale, and received £125 from McCrea, and, as appears by the sheriff's memorandum, which is good evidence, because it is an entry in the usual course of business, and also against interest, he received this money as the price of this particular lot which McCrea had purchased. It was the sheriff's duty also to have made a deed. Admittedly, however, he did not make it for several years after the sale. A memorial, or a document professing to be a memorial, was executed in December, 1830, by the grantee, of what is alleged to have been this particular deed, and it was registered at that time. Possession was not taken under this supposed deed until about eighteen years after the making of it, and about twenty-three years after the actual sale; but possession has been held for the last eighteen years under this alleged deed, and the defendant now maintains his possession by virtue of it.

I think, upon these facts and upon duly considering both the case of *Regina v. Fordingbridge*, and the case of *Gough*

v. McBride (10 C. P. 166), that this was good secondary evidence, and that it did establish in law the fact of the making such a deed.

I am of opinion that the defendant did make out a good defence to the plaintiff's title, of which he had given notice, and I think the rule should be discharged.

Rule discharged, with costs.

PETTIGREW v. DOYLE.

Lease under seal—Execution by agent unauthorized by deed—Adoption by principal—Evidence—Plaintiff bound by his notice of title.

Plaintiff's agent, without authority under seal, by deed leased to defendant for seven years certain land belonging to plaintiff.

The evidence shewed that the lease when signed was delivered to plaintiff, and that he several times requested the agent to go and see whether defendant had performed his covenants under the lease; that he had never objected to the lease, but he had been on the lot, and had had it surveyed after defendant took possession of it.

The jury found that plaintiff had adopted the lease, and re-delivered it as his deed:

Held, that their finding was right, and that the lease was binding upon the plaintiff.

Plaintiff in his notice claimed by direct chain of title from the patentee of the crown:

Held, that he could not rely, in answer to a lease of the premises set up by defendant, upon a forfeiture of such lease for non-performance of covenants; but that he should have set out this forfeiture in his notice of title, if he wished to avail himself of it.

This was an action of ejectment, brought to recover the east half of lot number seven, in the sixth concession of the township of Tossorontio, in the county of Simcoe.

The defendant appeared and defended for the whole of the land mentioned in the declaration.

The plaintiff, in his notice of title, stated he intended to set up title by virtue of a deed of bargain and sale from David Weir, who derived title from James Hopkins, the patentee of the crown.

The defendant, by his notice, set up title by virtue of a lease from the claimant to the defendant, dated 1st September, 1863, to hold for seven years from that date.

The cause was taken down to trial at the spring assizes of 1866 for the county of Simcoe, held before *Adam Wilson, J.*, when a verdict was rendered for the plaintiff.

The instrument put in as a lease by the defendant was in writing, and was called an indenture. It was dated 1st September, 1863. The plaintiff was the lessor and defendant the lessee of the land set out in the writ, and the lessee was to hold for seven years from date, on condition that he chopped and cleared seven acres a year and yearly until the expiration of the lease, and put the same under proper state of cultivation, and built a barn thirty-five feet by forty feet four years from date, paid all taxes and performed all road work. The lessor was not to restrict the lessee from clearing seventy acres, and was to allow him all the timber he wanted for the building of the barn and for firewood off the lot. The lessee covenanted to perform the conditions in the manner aforesaid, and to have the premises fully enclosed with good and lawful fences; otherwise the indenture to be null and void. He also covenanted to yield up the premises to the lessor peaceably and quietly at the end of the term.

The instrument concluded as follows: "This indenture is signed by Thomas Henderson, of the township of Mono, county of Simcoe, and province aforesaid, authorized agent of the (lessor).

"Executed, signed and sealed in duplicate, at the village of Rosemount, this twenty-ninth day of August, A.D., 1863.

"(Signed) HENRY PETTIGREW.

"per Thomas Henderson.
his

"(Signed) EDWARD + DOYLE.
mark.

"Witnesses present,

"(Signed) George Cuming.

"(Signed) Edward M. Wansborough."

Henderson, who signed the instrument for plaintiff, said that plaintiff authorized him to do so, and that after it was signed he gave it to plaintiff. The plaintiff, at different

times, wanted him to go and see if defendant had performed his contract, which he had heard he was not doing, and he intended to try to get him off the land. Plaintiff never objected to the lease, but had been on the lot and had had it surveyed since defendant had been there. The witness stated that he believed there were two seals on the lease when he signed it: he was sure of it. He had no power of attorney from plaintiff authorizing him to sign the lease.

Another witness deposed to seeing a copy of the lease with plaintiff, and that he was perfectly satisfied with it. Plaintiff said four or five months before the trial that he had no fault to find with the lease, but said he should have had power to enter on the place, to see if defendant had performed his covenants.

There was evidence offered to shew that defendant had not performed his covenants as to the clearing, &c.

On behalf of the plaintiff it was contended that the lease was not sealed, and the agent had no authority to execute a sealed instrument; that if the lease should be looked upon as made under the verbal authority, it was for more than three years and therefore void; that there was no authority in writing to Henderson to execute as agent, within the Statute of Frauds; that there was no proof of ratification, or of any other fact from which a tenancy from year to year could be implied; and, if the lease was valid, that there had been a forfeiture of it, by reason of the breach of the covenant.

Defendant's counsel, in reply, contended that there had been such an adoption by plaintiff that he could not afterwards repudiate the lease. *Tupper v. Foulkes*, 9 C. B., N. S. 797, shewed that a subsequent ratification might be held to be a new delivery by the lessor; that the plaintiff was not at liberty to rely on the alleged forfeiture, because he had not relied upon it in his notice of title.

As to this last objection, counsel for plaintiff referred to *Canada Co. v. Wier*, 7 U. C. C. P. 341.

The learned judge told the jury there was evidence of what might be considered a subsequent delivery of the lease

by plaintiff to defendant, but left it to them to say whether they were satisfied there had been a subsequent delivery. He ruled that if the subsequent delivery were not proved to their satisfaction, the lease was void as a lease for seven years, because made by a person not authorized under seal ; but that would not necessarily entitle plaintiff to possession, for the defendant would at any rate be entitled to a demand of possession, or perhaps a notice to quit.

He left it to the jury to say, whether there had been a forfeiture of the lease or not : if there had been, to find for plaintiff ; and, if they found against defendant on this point, the defendant was to be at liberty to move to enter a nonsuit, if the court should be of opinion the plaintiff should have stated the breach of condition of the lease as a part of his claim of title ; and the plaintiff was to be at liberty to move to enter a verdict for him, if the court should be of opinion there was not any evidence to go to the jury of plaintiff having delivered the lease. He stated also that if the lease only took effect from the delivery by plaintiff, the clearing of the seven acres yearly commenced perhaps only from the delivery by the plaintiff : if so, then it did not appear one year had at the time elapsed.

Defendant's counsel contended the judge should have charged the jury, on the facts proved, that there was a delivery of the lease by plaintiff.

The judge told them there was evidence from which they might infer it, but refused to direct them to find it.

The plaintiff's counsel objected that there was no evidence to go to the jury on which they might find the lease to have been adopted by the plaintiff as his deed.

The jury found plaintiff did adopt the lease and deliver it as his deed, but that defendant broke his contract. They found for the plaintiff.

In Easter Term last *Boys*, for the defendant, obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, on the ground that plaintiff, under his notice of title in this action, could not shew the covenants in the lease, under which the defendant claimed title, had been broken ; or for

a new trial, on the ground that the verdict was contrary to law and evidence, and against the weight of evidence.

D. McCarthy, jr., shewed cause :—The evidence of defendant entering under plaintiff does not prove a title, but shews the defendant is estopped from denying plaintiff's title. But plaintiff's title is quite independent of that, and was properly stated in the notice to be what it really is. When the defendant set up the lease the plaintiff had a right to shew it was void, or had been forfeited. What was done was merely displacing the instrument defendant set up, not proving any new title.—*Canada Co. v. Wier*, 7 U. C. C. P. 341; *Grace v. Whitehead*, 16 U. C. Q. B. 50; *Hill v. McKinnon*, 16 U. C. Q. B. 216; *Coltman v. Brown*, 16 U. C. Q. B. 133; *Shore v. McCabe*, 10 U. C. C. P. 26; *Thompson v. Falconer*, 13 U. C. C. P. 78.

Plaintiff has a right to uphold his verdict on any ground. There was no evidence of the execution of the lease by plaintiff: there was no authority under seal to execute it, and there was no evidence of ratification. *Tupper v. Foulkes*, 9 C. B. N. S. 797, is no authority to the contrary.

He also referred to *Lord Gosford v. Robb*, 8 Ir. L. Rep. 217; *Hunter v. Parker*, 7 M. & W. 343, per *Parke*. B.

Boys, contra :—

The case of the *Canada Co. v. Weir* is no authority for plaintiff. The facts were not at all like those in this case. Unless plaintiff is compelled to state the ground of forfeiture in his notice of action defendant cannot tell what plaintiff is proceeding for, and must then come prepared to prove the performance of every covenant contained in the lease, a breach of which would be a ground of forfeiture.

There is no proviso in the lease for re-entry in case of forfeiture, and plaintiff can only bring ejectment after notice to quit.—*Cole on Ejectment*; *Doe Birmingham Canal Navigation v. Bold*, 11 Q. B. 127.

It was necessary to terminate this yearly notice, at all events, before plaintiff could bring ejectment.

A. WILSON, J. delivered the judgment of the court.

The first question to be considered is, whether the alleged lease was binding on the plaintiff; and from the facts before stated we think it was. *Tupper v. Foulkes*, cited at the trial and upon the argument before us, establishes this. In that case the son of the defendant executed the deed for his father, "John William Foulkes, per Thomas Foulkes." On the plea of *non est factum* it was proved that the deed, being shewn to the defendant, executed as above, he was asked whether his son had authority to execute it for him, and whether he adopted his son's act, to which he answered in the affirmative; and it was held that this amounted to a re-delivery of the deed, and sustained the issue.

In the present case, the jury found as a fact that the plaintiff did adopt the lease and deliver it as his deed, and we think they were quite justified in doing so, upon the evidence.

The second question is, whether the claimant should, if he had the right of re-entry for the alleged forfeiture of the lease, have relied upon the forfeiture in his notice of title?

His notice now is, that he claims under a bargain and sale from James Hopkins, the patentee of the crown; and the defendant says this is not *the title* under which he now claims a verdict.

My own opinion is, there would be no necessity for a landlord, on the expiry of a lease to the defendant, to state that he claimed title by reason of the expiry of the lease, because by cesser of the term (by lapse of time) the term itself would be completely satisfied and ended, and the estate without any further act on the part of the landlord, done or to be done, would vest again in him under his prior title.

So the mortgagor, if he paid his money at the day, by which the condition was literally performed, would, I think, by reason of his former estate vesting in him, be warranted in claiming under his former title, without reference to the mortgage or to the fact of its extinction.

So a remainderman or reversioner might, I think, claim

in respect of the deed or devise which conferred the estate, without adverting to the determination of the preceding estate, or other event happening in the ordinary course of devolution which united the possession with the subsequent estate.

But in the case of a forfeiture the estate is not by law absolutely cast on the lessor : it is a forfeiture or not at his election ; and in an action to effect or effectuate his re-entry the lessor must, I think, shew the title by and upon and in respect of which he claims such a right ; as, I think, if trespass were brought against him for the re-entry, he would have to justify it under the right which he derived by reason of the forfeiture.

In *Doe d. Bridger v. Whitehead* (8 A. & E. 571), in which the plaintiff was proceeding for alleged breaches in a lease, to insure and to repair, it was held that, as the plaintiff relied on something done or permitted by the lease, he took upon himself the burden of proving that fact.

Lord *Denman*, C.J., said : “ Then, it is said, the fact of insurance ought to have been proved by the defendant. I am not of that opinion. The estate was vested in him, and his title could be got rid of only by proving a forfeiture.”

Littledale, J., said : Where a landlord brings an action to defeat the estate granted to a lessee, the onus of proof ought to lie on the plaintiff. It is true that, if the action had been covenant, the onus would have been on the defendant ; but that does not shew that it will so lie in a different form of action.”

The notice of claim required by the statute is in the nature of particulars, and, after a particular that the plaintiff was claiming under a deed from Weir to himself, the plaintiff never would have been permitted to prove that it was for a forfeiture of lease made by himself to the defendant for which he was proceeding. In a case of alleged forfeiture the plaintiff can be required to give a particular of the precise breach or breaches upon which he relies ; and unless this be done under the statutory particular, there would be neither sense nor purpose in requiring it.

None of the cases referred to have much bearing on this point.

We are, therefore, of opinion that as the defendant had the estate vested in him, and the plaintiff was seeking to divest it out of him, and as the burden of proof lay upon the plaintiff, that he should have set out in his notice of claim under the statute "the nature of the title intended to be set up.....stating it with reasonable certainty," which was the breach of some of the covenants of the lease; and as he did not do this, there should be on the leave reserved a nonsuit entered.

Rule absolute for nonsuit.

MONK V. FARLINGER.

Conveyance by married woman—1 Wm. IV. ch. 2—Certificate—Evidence—C. S. U. C. ch. 85, sec. 11—Joint execution by husband and wife—Deed upwards of thirty years old—Possession—Presumption of law—Public officers.

The statute 1 Wm. IV. ch. 2, did not require that the place of execution of a deed by a married woman should be mentioned in the certificate to be endorsed thereon, but merely the place of her appearance before the justices for examination; and this place is sufficiently indicated by the marginal venue in the certificate, as, for instance, "Province of Upper Canada, *Eastern District*, to wit;" and the words "then and there" refer to the margin.

It appeared from the deed, in this case, that it was dated 20th of October, and from the certificate that it was dated 17th of November following:

Held, on objection that the examination did not take place on the day of the execution of the deed, as required by the above act, that this defect, if it really existed, was cured by 22 Vic. ch. 35, sec. 2.

Held, also, that the act in question did not require the deed to be executed by husband and wife jointly *in the presence of the justices*, but only that it should be executed by her jointly with her husband, and that she should execute it in their presence.

Burns v. McAdam, 24 U. C. R. 451, referred to as defining the meaning of joint execution.

The statute provided that the certificate might be in some form of words *to the effect* prescribed thereby. In this case the words of the certificate were: "Being separately and duly examined by us, consented thereto (referring to the execution of the deed); and it appears to us that such consent was free and voluntary, and not the effect of coercion, or the fear of coercion, on the part of her husband, or any other person:"

Held, synonymous with, "being examined apart from her husband, did appear to give her consent to depart with her estate, freely and voluntarily, and without any coercion on the part of her husband," &c.

Held, also, that the certificate in question, as remedied by C. S. U. C. ch. 85, sec. 11, containing in substance all that the statute under which it was given required, was evidence of the fact of examination, &c., in accordance with *Jackson v. Robertson*, 4 C. P. 272.

Defendant produced a deed, upwards of thirty-one years^{old}, with such certificate thereon, from plaintiff and her husband to the devisor of defendant's wife, and it was admitted that defendant and those under whom he claimed had been in possession during all this period:

Held, following *Osser v. Vernon*, 14 C. P. 573, that the deed with the certificate upon it, coming from the proper custody, proved itself; and that from the fact that the possession of the land had gone in accordance with it for more than thirty-one years, it would be presumed that the deed as produced had been properly executed, and that every thing done by the justices, as public officers, had been rightly done until the contrary was shewn.

Ejectment to recover the west half of lot number twenty-nine, in the first concession of Williamsburg, in the county of Dundas.

The defendant appeared and defended for the whole lot.

The plaintiff, in her notice of title, claimed the lot as the only child and heiress at law of Michael Haines, deceased.

The defendant, besides denying the plaintiff's title, claimed title in himself, under a deed from Matthias Monk and Elizabeth Monk to William Kyle, and a devise under the last will and testament of William Kyle to Elizabeth Kyle, the wife of the defendant.

The cause was taken down to trial at the last spring assizes for the united counties of Stormont, Dundas and Glengarry, held before *J. Wilson, J.*

It was admitted that Michael Haines, the plaintiff's father, died seised of the land in fee in 1819, and that plaintiff was his heiress at law; that Matthias Monk was her husband in 1830, and that he died about two years ago; that defendant, and those under whom he claimed, had been in possession from the 10th of September, 1834, and that the instrument produced was the will of William Kyle, devising the property to the defendant's wife.

A deed, dated 20th of October, 1834, purporting to be from Matthew Monk and Elizabeth Monk, his wife, to William Kyle, was also put in, whereby, in consideration of £400, they granted, bargained, sold and conveyed to Kyle in fee the west half half of lot number twenty-nine, in the

first concession of Williamsburgh, containing one hundred acres. The deed purported to be executed in presence of Ewan Stewart and Abraham Bice. On the back of it the following certificate was endorsed :—

“Province of Upper Canada, } Be it remembered that
 Eastern District, to wit : } on the seventeenth day of
 November, in the year of our Lord one thousand eight
 hundred and thirty-four, before us personally appeared the
 within named Elizabeth Monk, one of the within named
 grantors in the within written indenture, and then and
 there acknowledged before us that the within written inden-
 ture of bargain and sale was her act and deed, and was by
 her duly executed, in order and to the intent that the same
 indenture, together with the acknowledgment thereupon had,
 should be effectual to pass the inheritance, in fee simple, of
 the land and tract of land and premises within mentioned
 to be bargained, sold and conveyed, and that she hereby
 grants and relinquishes all her right, title, claim and interest
 in all the real estate in the same. The said Elizabeth Monk,
 being separately and duly examined by us, consented thereto;
 and it appears to us that such consent was free and voluntary,
 and not the effect of coercion or the fear of coercion on the
 part of the husband or any other person, which we attest
 under our hands in our capacity of magistrates.

“(Signed) ALEX. ROSS, J.P.

“(Signed) JOHN CHRYSLER, J.P.”

It was proved that the justices of the peace, who took the acknowledgment were Alexander Ross, who died in 1835, in whose handwriting the certificate on the deed was, and John Chrysler, who was also a justice of the peace for the Eastern District, and who died within six or seven years. The certificate was signed by both of them.

Abraham Bice, called for the plaintiff, stated that the signature to the deed as a witness was his, but he had no knowledge of ever having signed it. He knew E. Stewart, the other witness, who it was admitted was deputy sheriff, and was killed in 1835. He was present in Monk's house when Mr. Kyle called witness to see him pay money to Stewart. Mr. and Mrs. Monk were present. He never saw those same people present at any other time to his knowledge. He did not remember witnessing a deed from

Monk and his wife to Kyle. Ross and Chrysler were not present on the occasion he spoke of: he knew them both well. He was plaintiff's son-in-law. His wife was living. Ross lived half a mile from plaintiff's, and Chrysler three or four miles.

It was objected that the certificate was void, as the law stood, for the place where the execution took place was required to be mentioned in the certificate; that the examination was had at a time subsequent to the day of the examination of the deed, the deed being dated 20th of October, and the certificate the 17th of November following; that it did not appear the examination was made apart from the husband, or the deed executed before the justices; that there was no evidence of the fact of her having appeared before the justices, whose statement of that fact was no part of their duty; that it appeared from the certificate there was no joint execution of the deed by plaintiff and her husband; that she only acknowledged the deed before them, and they had no authority to take her acknowledgment; that it did not appear from the certificate that she freely and voluntarily departed with her estate in the lands in the deed mentioned; that Con. Stat. U. C. ch. 85, sec. 13, did not cure the defect, because the defendants had not proved the requirements of the law had been complied with on the execution of the deed, or granting the certificate; that under the eleventh section of the act the defect was not cured for the same reason.

The learned judge overruled the objections.

The defendants proved the signature to the deed to be that of the plaintiff, as also the handwriting of Ewan Stewart.

The learned judge told the jury to say, whether the deed was executed by plaintiff and her husband jointly, and by her in the presence of the justices, and whether she was examined apart from her husband; that if so, their verdict should be for the defendant, and the plaintiff should have leave to move the court that the verdict be entered for her, if the court should be of opinion the deed did not pass her

estate to Kyle. They were told plaintiff had made a good title, unless displaced by the deed the defendant set up; that as regarded this deed, the possession of the land so far upheld it, and its age proved it; that the evidence of Bice was set up to impugn it, and when they considered his evidence they might consider his contingent interest in it through his wife; that after so long a lapse of time they must be satisfied that his evidence fairly impugned its execution, and its execution by her in presence of the magistrates; and if it satisfied them that the deed was not thus executed, they ought to find for plaintiff; that if they found as a fact the deed was not executed by Monk and his wife jointly, and by her in presence of the magistrates, and that they examined her apart from her husband touching her consent to part with the estate, then they ought to find for plaintiff, otherwise for defendant; that after so long a time everything ought to be presumed in favor of the deed, unless the contrary was made out.

The plaintiff's counsel objected that the learned judge should have told the jury that that part of the certificate which related to her acknowledgment of the execution of the deed was not evidence of the execution by her jointly with her husband in the presence of the magistrates, and was not evidence against her at all, being extra-judicial; that the age of the deed was not evidence of the execution in the presence of the justices; that the acknowledgment of the execution of a deed by a married woman would not bind her, and was not an execution; and where no power was given to them to take an acknowledgment, that there was no presumption in this case that everything was properly done in the execution; that the word "separately" was not evidence of examination apart from her husband, on account of unity of character of husband and wife, instead of the contrary; that he ought to have told the jury that the defendant ought to have proved everything necessary to sustain the deed, and presume nothing in its favor, in so far as the requirements of the acts respecting married women were concerned.

The jury found a verdict for the defendant.

In Easter Term last *J. K. Kerr* obtained a rule *nisi*, calling upon the defendant to shew cause why the verdict obtained should not be set aside, and a verdict entered for the plaintiff, pursuant to leave reserved, upon the following grounds:—

Because the deed from Matthias Monk and his wife, Elizabeth Monk, to William Kyle, under which the defendant claimed, was not valid and had no effect, or was void upon the face of it, for the following reasons:

1. No place of execution of such deed was named in the certificate endorsed thereon, as required by the act passed in the first year of the reign of King William the Fourth, chapter two.

2. There was no evidence that the said Elizabeth Monk was examined by two justices of the peace, or other person, as required by such act, on the day of the execution of the said deed; but, on the contrary, if there was any evidence it was that she was examined on a day subsequent to the day of the execution of such deed.

3. The certificate endorsed on such deed did not shew that such deed was executed by the said Elizabeth Monk jointly with her husband, in the presence of two justices of the peace, on the date of the said deed, and there was no other evidence of that fact; but, on the contrary, if the said certificate was evidence, it shewed that the deed was not jointly executed by the said Elizabeth Monk and her husband in the presence of the justices.

4. The certificate, if evidence, did not shew that the said Elizabeth Monk was examined apart from her husband.

5. There was no evidence of free and voluntary consent on the part of the said Elizabeth Monk to depart with her estate in the land in the said deed mentioned.

6. The said certificate was not evidence of anything, nor was it admissible as evidence, because it was not in the form required by said act, nor did it comply with the requirements of said act, and it was necessary to prove the actual execution of such deed in the presence of two justices and in accordance with the other requirements of the said act.

7. There was no evidence of the execution of the said deed in the presence of the justices, and the age of the deed did not prove such execution, nor did it raise any presumption of such execution.

8. The said certificate was not evidence of the acknowledgment therein stated, as the fact relating to such acknowledgment was extra-judicial, and should have been suppressed, as the justices were then certifying matter which the said act did not require or authorize to be certified; and the said justices had no power or authority to take an acknowledgment or to certify the same, and the acknowledgment of a married woman, made during coverture, was not binding.

S. Brough, Q.C., shewed cause. He cited 1 Wm. IV. ch. 2; 2 Vic. ch. 6; C. S. U. C. ch. 85, secs. 10, 11, 13; *Tiffany v. McCumber*, 13 U. C. 159; *Allison v. Rednor*, 14 U. C. 459; *Jackson v. Robertson*, 4 C. P. 272; *Orser v. Vernon*, 14 C. P. 573.

The Reporter called the attention of the court to *Burns v. McAdam*, 24 U. C. 449.

Kerr, contra, cited *Robertson v. Eddington*, 4 Es. 8; *Percival v. Nanson*, 7 Ex. 1; *Poole v. Dicas*, 1 Bing. N. C. 649.

J. WILSON, J., delivered the judgment of the court.

The acts relating to the conveyance of real estate by married women are the 59 Geo. III. ch. 3; 2 Geo. IV. ch. 14; 1 Wm. IV. ch. 2; 2 Vic. ch. 6; 14 & 15 Vic. ch. 115; 22 Vic. ch. 35; and the Con. Stat. U. C. ch. 85.

This conveyance was executed after the passing of the act 1 Wm. IV. ch. 2, and the certificate upon it was made in compliance or supposed compliance with that act. The sole question here is, whether that act was complied with, and if not, whether the non-compliance has been cured by any of the acts which have since been passed. This act declared that it should be lawful for any married woman, above the age of twenty-one years, residing within this province and seised of real estate therein, to convey her real estate by deed to be executed jointly with her husband,

to such uses as to her and her husband should seem meet ; but the conveyance should have no effect unless she executed it, in the presence of certain judicial officers therein named, or in the presence of two justices of the peace, in and for the district in which such married woman should reside ; and unless they should examine her apart from her husband respecting her free and voluntary consent to alien and depart with her estate as mentioned in the deed ; and should, on the day of the execution of the deed, certify on the back of the deed, in some form of words to the effect following, " That on the day mentioned in the certificate such married woman did appear before him, or them, at the place to be named in the said certificate, and being examined by him, or them, apart from her husband, did appear to give her consent to depart with her estate in the deed mentioned, freely and voluntarily, and without any coercion, or fear of coercion, on the part of her husband, or of any person or persons whatsoever."

The act declared that it should not in any case be necessary for any justices, who took the examination, to attest the deed as a subscribing witness.

Now, the objections raised to this deed are eight, which may thus be more conveniently stated : That the place where the deed was executed is not mentioned in the certificate, as required by the statute 1 Wm. IV. ch. 2 ; no evidence that Elizabeth Monk was examined by two justices on the day of the execution of the deed, but on a subsequent day ; that the certificate does not shew the deed was executed jointly with her husband in the presence of two justices on the day of its execution ; and there is no evidence of that fact, but, on the contrary, the certificate shews it was not jointly executed by the husband and wife in the presence of the justices ; that the certificate does not shew she was examined apart from her husband ; that there is no evidence of free and voluntary consent on the part of the wife to depart with her estate in the lands ; that the certificate is not evidence of anything, nor admissible as evidence,

because not in the form required by the act, nor in compliance with its requirements; that it was necessary to prove the execution of the deed in the presence of the two justices, and all the other requirements of the act, of which there is no evidence; that the age of the deed does not prove its execution in accordance with the act, or raise any presumption of its proper execution; that the certificate is not evidence as to the acknowledgment of the deed mentioned in the certificate, and any acknowledgment of a married woman made during coverture is not binding.

By reference to the statute, it does not require that the place where the deed was executed should be mentioned in the certificate, but the place is to be named where she appeared before the justices. There is nothing, therefore, in the objection as taken; nor is there, we think, in the objection at which the plaintiff aimed, that no place is named in the certificate where the examination took place. We think a place is named where this did take place; for the first words of the certificate are the usual words of venue, "Province of Upper Canada, Eastern District, to wit." In the technical sense of these words, if written on the margin of a declaration, they mean the county in which the several facts mentioned in the body of the declaration, or some principal part of them, occurred.—See 7 Rep. I.; 4 B. & Al. 175, 176; 2 T. R. 238. Our districts were unions of counties, and were treated as counties. In analogy to this meaning we think they mean, *in the Eastern District of the Province of Upper Canada what we certify did there take place, and that the place where she appeared was the Eastern District*, in which the proof is, the magistrates who signed the certificate, acted as justices of the peace. The words in the certificate are, that "she then and there," &c.

It appears by the deed that it was dated on the 20th day of October, 1834, and from the certificate that it was dated the 17th of November of the same year. It was, therefore, open to the objection taken, that she was not examined on the day of the execution of the deed; but this defect, if it really existed, was cured by the 22nd Vic. ch. 35, sec. 2,

which was passed to meet precisely such a predicament as this deed and certificate present.

There is nothing in the objection that the certificate does not shew that the deed was executed by Mrs. Monk jointly with her husband, in the presence of two justices of the peace; for the act does not require this. But it is objected that there is no evidence of that fact; nor need there be: the act does not require that the deed shall be executed by the husband and wife jointly in the presence of the justices, but only that the deed shall be executed by her jointly with her husband. Now the production of it proves what it purports to be, being thirty years old, a deed executed jointly by husband and wife. But it would not be valid or have any effect unless she executed it in the presence of the justices. The objection taken rather sustains its proper execution, for it points at her having executed it in the presence of the justices alone, one of the very things the statute required to give it effect.

As to the objection that the certificate does not shew she was examined apart from her husband, the statute does not require the certificate to be in the given form, but "in some form of words to that effect." The words in the form are, "apart from her husband." The words in the certificate are, "being separately and duly examined by us." The first definition of "apart" is "separated from." They are, therefore, words to the same effect. "The said Elizabeth Monk, being separately and duly examined by us, consents thereto (*i. e.* the conveyance of the land), and it appears to us that such consent was free and voluntary, and not the effect of coercion or the fear of coercion on the part of her husband, or any other person," are words to the effect, "being examined apart from her husband did appear to give her consent to depart with her estate in the deed mentioned freely and voluntarily, and without any coercion or fear of coercion on the part of her husband," &c.*

It is objected that the certificate is not evidence of any-

* See *Stayner v. Applegate*, 8 C. P. 451, which was sustained in appeal, but the appellate decision in which does not appear to have been reported.
—REPORTER.

thing, nor admissible as evidence, because not in the form prescribed by the act, nor in compliance with it. In *Jackson v. Robertson* (4 U. C. C. P. 272,) it is said "that the certificate has always been received as proof of the fact of examination, &c., though not expressly made evidence by the statute like the certificates of registration endorsed by county registrars;" and the practice has been so since the passage of these acts; but it is proof of nothing beyond what the statute authorizes to be certified. We think this certificate, as it was remedied by the subsequent statute, contains in substance all that the statute under which it was given required.

Having thus decided, we ought, perhaps, to pass unnoticed the objection, again repeated, that it was necessary to prove the execution of the deed in the presence of the two justices, and all the other requirements of the act, of which it is said there is no evidence; because the age of the deed, it is said, does not prove its execution in accordance with the act, or raise any presumption of its proper execution. It is clear that the act does not require the deed to be executed jointly in the presence of two justices, and as to what is a joint execution, it is laid down in *Burns v. McAdam* (24 U. C. Q. B. 49) that jointly does not necessarily mean that the husband must execute it in his wife's presence. As regards the deed and certificate, we hold now, as we held in *Orser v. Vernon*, and on the same authorities, that the deed, coming from proper custody with the certificate upon it, proves itself; and that from the fact that the possession of the land had gone in accordance with it for more than thirty-one years, it will be presumed that the deed as produced was properly executed, and that all things done by public officers were rightly done until the contrary is proved: *Allison v. Rednor* (14 U. C. Q. B. 459). Here, however, the signatures of the magistrates were proved, and that they were justices of the peace in and for the Eastern District. The last objection, so far as it affirms as law that the certificate proves nothing beyond what the statute authorizes, we assent to, but it does not affect this case.

We should have felt that a failure of justice had taken

place if the plaintiff had sustained her case. Here the defendant's father-in-law had purchased a farm nearly thirty-two years ago, at a fair price, from the plaintiff and her husband, she being the better educated and more intelligent of the two. Kyle took possession of it at the time, and lived upon it till he died. He left it to a member of his family as a provision, and now the plaintiff, because, from local circumstances, this land has acquired a value greatly out of proportion to the price paid for it, though good at the time, sought to deprive its now owner of it, on the objections raised to the execution of the conveyance.

The rule will be discharged with costs.

Rule discharged, with costs.

HOPE V. WHITE ET AL.

Illegal distress for rent—2 W. & M., sess. 1, ch. 5, s. 5—*Assignment of rent*—*Distress by assignee*—4 Geo. II., ch. 28, s. 5—4 Anne, ch. 16, ss. 9, 10.

The action for double value, under 2 W. & M., sess. 1, ch. 5, s. 5, for illegal distress for rent, is not confined to the landlord only, but extends to those who distrain on his behalf, or in his name or right.

A landlord may assign rent, and since the statute 4 Geo. II., ch. 28, s. 5, rent-seck may be distrained for, and by one who has not the reversion, as, for instance, the assignee of the landlord.

In this case, one of the defendants assigned certain rent to a co-defendant, who gave the tenant (plaintiff) notice:

Held, that such assignment conferred an estate, and that under 4 Anne, ch. 16, ss. 9, 10, the assignee was entitled to distrain for the rent in question, whether the tenant attorned or not.

Seemle, that debt might have been maintained by the assignee for the rent.

This was an action under the 2 William and Mary, sess. 1, c. 5, sec. 5, brought by the plaintiff against the defendants for double damages, for a wrongful distress and sale when no rent was due.

The declaration also contained a count in trespass.

The defendants, McLean & Keller, pleaded not guilty under the 11 George II., cap. 19, s. 21.

The defendant White allowed judgment to go by default.

The trial took place at the fall assizes of 1865, held for the united counties of York and Peel, in Toronto, before Adam Wilson, J.

White was the owner of a piece of land in the township

of Markham, being the front 75 acres of lot 7, in the 10th concession of that township.

By an indenture, made the 10th day of April, 1863, between him, of the first part, and Hope and one Banks, of the second part, he leased that land to them for seven years from the first day of April, 1863, at a rent of \$200 a-year for the first two years, and at \$262 50 per year for the remaining five years of the term, payable on the first days of October and April in every year during the term, without deduction on any account.

About this time White was indebted to the defendant McLean, and by an agreement under seal, made between them, dated 21st July, 1863, in which the above-mentioned lease was in part recited, White assigned McLean the six months' rent to become due on the lease on the first day of October, 1864, and the six months' rent to become due on the first day of October, 1865. White, by the same agreement, authorized McLean to distrain for the rent, if necessary. He also signed a notice to Hope and Banks of this assignment, which, as appeared by other witnesses, plaintiff received.

On the 13th of April, 1865, the rent so assigned being in arrear and unpaid, McLean issued a distress warrant in the name of White, requiring Keller, the other defendant, to distrain the goods, &c., on the said leased premises, for \$100, being the half-year's rent due on the first day of October, 1864. On the 22d April, 1865, Keller distrained a pair of horses, nineteen sheep, and four cows. On the 3rd May he sold three cows, seventeen sheep and twelve lambs, for \$122 62, the distress with costs being \$116 48.

To establish his case plaintiff called the defendant Keller, who proved the warrant of distress, which was signed in the name of White by McLean, as his attorney. He also proved the sale of the cattle, sheep and lambs under it, and that they realized \$122 62. He said the plaintiff had denied that McLean had given him notice of the assignment, but admitted that he had heard of it.

The plaintiff also called the other defendant, White. He

said Banks was made one of the lessees that he might be made surety for the plaintiff. He was shewn a receipt, dated 26th August, 1864, which he said was his, for rent in full from plaintiff up to the first of April, 1865. He looked at a promissory note for \$67 50, dated 26th August, 1864, and said this note plaintiff had paid him on account of rent. He looked at another promissory note for \$87 50, and said this had also been given him on account of rent. He stated that he had rented part of the place back for \$25 a-year, which was to be deducted from the rent on the lease; that the note for \$87 50, with the \$12 50 deducted, was rent for one half year, and the other note, for \$67 50, was the balance of the other half year; that the plaintiff had paid him at the house \$20, and he had allowed his rent, \$12 50, which made up the \$100, and that in this way the rent was paid up to the 1st April, 1866. He said that he had negotiated these notes not long after he got them; that he had signed a notice to the lessees that he had assigned the rent to McLean; that he had been in the bankrupt court; that he liked every one to have his rights; McLean had not had his; that he had borrowed money from him and assigned the rent for its payment. He could not say whether he had told Hope of the assignment of the rent; McLean had agreed to wait before he distrained, saying he was not particular how long he waited, if he was secure; but this was said after White had settled with plaintiff in August for the rent, of which he told McLean at the time, when he said he would wait.

Another witness valued the cattle and sheep at \$181, and others gave general evidence that they were worth this amount.

At the close of the plaintiff's case counsel for McLean & Keller objected that as to McLean it was not shewn he had anything to do with the seizure, excepting that he signed the warrant as White's attorney, which did not make him liable for the distress; that as to the first count, that was an action against a landlord, and others could not be made liable for double value, which was a punishment to the landlord

personally; and as it was against White, as landlord, the other defendants were not liable.

The plaintiff's counsel contended, in reply, that McLean had put Keller in motion and got the proceeds of the sale for his own benefit; that the second count was trespass against the landlord and the persons actually distraining, who were both liable. He referred to Arch. L. & T. 276.

The learned judge reserved leave to the defendants to move to enter a nonsuit on the first count.

The defendants called Alexander Muir, who said that he had written the assignment and witnessed its execution, and had drawn the notice of the assignment which was to be given to Hope, and White signed it.

Preston McLean, the brother of the defendant, McLean, said he took this notice of the assignment of the rent to McLean, shewed it to Hope, and offered to give him a copy of it, but he said he had heard of it from White himself, and that White's wife had told him not to accept of any paper; but he would as soon pay the rent to McLean as to White. This was in the end of July or beginning of August, 1863.

Another witness proved that plaintiff said he would not pay McLean, for he had not signed anything, but he knew of the transfer to McLean.

Another witness asked plaintiff if he had got a notice from McLean. He replied "Yes:" Preston had brought a paper which he would not look at, but White had told him he had made the transfer of the rent.

The learned judge submitted the following questions to the jury:

1st. Had the plaintiff notice of the assignment of the rent by White to McLean before or at the time when the note was given for \$67 50? If he had not, then, Had he notice at all before the distress?

2nd. Were the giving of this note and the settlement spoken of about the rent, in October, 1864, made in fraud of McLean's right?

3rd. Was this note for \$67 50 paid by Hope in full before the time of the distress on the 13th April, 1865?

To the first questions they answered, "No ;" to the last, "Yes."

They found the value of the goods sold \$162, which, doubled, made \$324.

The verdict was accordingly for the plaintiff, with \$324 damages.

In Michaelmas Term last *D. McMichael*, for the defendants McLean & Keller, obtained a rule *nisi* calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered for these defendants, pursuant to leave reserved; or, why a new trial should not be had between the parties, on the ground that the verdict was contrary to law and evidence; and for misdirection, in charging the jury that the defendant White was the owner of the rent distrained for and entitled to receive and settle for it, and that the defendant McLean was not entitled to distrain for it; and in telling the jury that others than the landlord could be made liable for double value; and that there could be no distress, if notes were taken for the rent; and because the verdict was contrary to law and evidence, and perverse, the jury having found that the plaintiff had no notice of the transfer of rent to McLean, contrary to clear evidence of notice; and that there was a fraudulent intention to settle in the absence of McLean; and because there was no evidence that the whole of the rent had been paid.

In Easter Term last *Robert A. Harrison* shewed cause, and cited Arch. L. & T. 2 Ed. 289; 2 Wm. & M. sess. 1, ch. 5, sec. 5; Parrott v. Anderson, 7 Ex. 93; Griffiths v. Chichester, Ib. 95; Palfrey v. Baker, 3 Pr. 72; Hebden v. Hartsink, 4 Es. 44; Reid v. Hutchinson, 3 Camp. 329; Lacey v. Forrester, 3 Dowl. 668; Lane v. Jarvis, 5 U. C. 127.

McMichael, contra, cited Yates v. Tearley, 6 Q. B. 282; Burton v. Barclay, 7 Bing. 745; Gilbert on Rents, 138.

J. WILSON, J.—B. F. White, one of the defendants, has allowed judgment to go by default, and does not complain of it; but the merits are all on the side of the other defendants, McLean and his bailiff Keller.

White, the original landlord of the plaintiff, to secure and pay money which he owed to McLean, assigned to him by deed certain rent then to become due from the plaintiff, in satisfaction of that debt. Afterwards, and after the plaintiff had notice of the assignment, and had assented to it, and before any part of the rent assigned had become due, he and White appear to have colluded to defraud McLean. In pursuance of it the plaintiff gave White his promissory notes in advance for the balance of the rent which had already been conveyed to McLean, after taking credit for certain deductions assented to by White, who, on his part, gave the plaintiff a receipt for the payment of this rent. When the rent became due, according to the terms of the lease, McLean claimed it, and the plaintiff set up the payment to White and his acquittal of the rent. On this McLean distrained in the name of White, by Keller his bailiff, and hence this action.

The plaintiff says that under all the circumstances which the case discloses no rent was due, and he claims damages for double the value of the distress, under the 2nd William and Mary. He says that in any event these defendants are trespassers, and he can recover on the trespass count. He says White could not distrain, because he had conveyed the rent, and McLean could not, because he had not the reversion, but a rent-seck only, for which, he says, he could not distrain.

Before we speak of the points on which this case must turn, we must refer to some of the objections mentioned in the defendants' rule. They complain of misdirection; but, according to the report of the learned judge who tried the cause, there was no misdirection. He suggested that if the rent was not payable to White, then the plaintiff had failed in proving his declaration; and that if rent could be conveyed, as his then view of it was, it had been conveyed, so that after notice to the plaintiff he could not pay it to White, and therefore the plaintiff had failed in making out his case. It was not necessary to rule whether McLean could distrain or not, as that was to be determined by the court, and in this view of the case the learned judge submitted to the jury,

among other questions, the question whether notice had been given to the plaintiff of the conveyance of the rent to McLean, a question which, we think, the jury negatived against the clearest evidence.

Nor was there any misdirection in telling the jury that others were liable in this action on the statute of William and Mary besides the landlord; for he, and they who distrain on his behalf, are liable. The words of the statute are, "Where no rent is in arrear or due to the person distraining, or to him in whose name or right such distress shall be taken, that the owner of the goods may by action of trespass, or upon the case, to be brought against the person so distraining, &c., recover double damages."—See *Lockier v. Patterson et al.* (1 C. & K. 271).

Nor did he direct that there could be no distress if a note had been taken for the rent; on the contrary, he intimated, as the law was, that the taking of a note for rent did not take away the remedy by distress.

The case presents this aspect, that if the rent to become due was conveyed to McLean, and the plaintiff had notice of it and assented, so as to become McLean's tenant, and there is evidence from which a jury may fairly infer attornment, then the plaintiff's case failed, for White was, in this view of it, no longer his landlord.

There has been a constant struggle since Lord *Mansfield's* time to adapt the rigid maxims of the common law to the every day dealings of the community, and to reconcile them to the common sense dealings of a restless, enterprising and commercial people.

The law does not admit of an assignment of choses in action; but it is an every day occurrence to assign them, and every day the assignee is permitted to use the name of the original creditor in their recovery, and the courts will restrain him as far as possible from colluding with his debtor to defeat the assignment. The case of *Trent v. Hunt* (9 Ex. 14), followed by *Suett v. Finch* (13 C. B. 651), is an instance of this kind in that branch of the law to which this case belongs. If the plaintiff were to succeed in the case before us it would be justly charged that the law permitted

a great wrong to be done ; first, by defeating an arrangement, honest, so far as we see, and very properly made ; and, secondly, in allowing not the less culpable of the two to obtain double damages from that which originated in his own want of good faith and fair dealing.

It appears to us that if McLean can maintain his right to distrain, either as White's grantee, or in his own right, his justification and that of his bailiff are complete.

It is quite true, as has been contended, that at common law distress did not lie for rent-seck (Litt. sec. 217, 218), but a writ of right or assize was the remedy ; but, since real writs have been abolished, the remedy would have been gone but for the statute 4 Geo. II. ch. 28, sec. 5, which gave distress for rent-seck.

But it is contended here, that he who distrains must have the reversion. This is not now law to the extent contended for : it is not law as regards a rent-seck, because of the statute of Geo. II. just quoted.

In *Dodd, Appellant, v. Thompson, Respondent* (12 Jur. N. S. 625), the latest case on this point, the court held that a rent charge without a clause of distress was an estate of freehold, and that the grantee was not without remedy for its recovery, for the 4 Geo. II. ch. 28, enabled the grantee to distrain for it.

The whole case lies in a very small compass. If White could convey the rent to McLean and he could distrain, the plaintiff's case was fully answered. But, according to Coke, 225, a landlord can assign rent, and, if the tenant attorn, the assignee can distrain. By the statute 4 Anne, ch. 16, secs. 9, 10, the grantee of rent can distrain if he gives the tenant notice, whether he attorn or not. The evidence shews clearly that the tenant had notice, but the jury have found perversely that he had not. There will, therefore, be a new trial, costs to abide the event.

A. WILSON, J.—The allegation in the declaration that the plaintiff was tenant to White *at rent payable by the plaintiff to White*, which is traversed by the plea of the general issue by statute, was not, I think, proved. I

thought so at the trial also, because White had assigned it to McLean, to whom it was in law payable.

If the rent were a mere chose in action, it would, notwithstanding the assignment of it to McLean, be still payable to White; for in law there can be no assignment of a mere chose in action. But, though rent *in arrear* is a chose in action—Sharp v. Key (8 M. & W. 379); rent not due is not a chose in action—Maund's case (7 Co. 28); it is an incorporeal hereditament—2 Bl. Com. 41. When assigned by the landlord, who retains the reversion, it is a rent-seck only—Co. on Litt. secs. 225, 228.

A rent-seck might have been sued for by different forms of writs real—Co. on Litt. secs. 233, 235, 236; Gilbert on Rents, 83, 106, 110, 124. At the common law there was no remedy for a rent-seck until seisin was had of it—Gilbert on Rents, 117. Perhaps debt might have been brought by McLean for this rent in his own name, as the rent is not of a freehold nature—Webb v. Jiggs (4 M. & S. 113).

A widow is dowable out of a rent-seck—Co. on Litt. 32 *a*; Parke on Dower, 112—which shews that such a rent is a *tenement*; and it is so distinctly treated in all the treatises and authorities; and the party has an estate in it—6 Co. 58 *b*.

The rent in this case was, therefore, clearly assignable in law, and conferred an estate on McLean. He was possessed of it as a tenement, although he had no interest in the land out of which it issued; and the assignee of it can, since the statute of 4 Geo. II., make distress for it in like manner as for rent service—2 Bl. Com. 43; Crabbe's Real Property, sec. 153; Williams on Real Property, 270.

This is the opinion I entertained at the trial; and the last decision, of Dodds v. Thompson, confirms all the previous cases and dicta on this point.

The rent was, therefore, not, in the language of the declaration, payable to *White*. It is of no consequence that the distress warrant is signed in White's name by McLean, as his attorney; for it is old law, that if a person distrain for an unjustifiable cause, yet when he comes to avow he

need not insist on the cause for which he distrained, but may justify for any lawful cause—*Greenvel v. The College of Physicians* (12 Mod. 386); *Trent v. Hunt* (9 Ex. 14); *Phillips v. Whitsed* (2 E. & E. 84).

So Lord *Kenyon*, C.J., said, in *Crowther v. Ramsbottom* (7 T. R. 634), “A man may distrain for rent and avow for rent service: if he can shew he had a legal justification for what he did, that is sufficient.”

The plaintiff, then, in my opinion, failed to prove his declaration.

This point was not taken at the trial; but I mentioned it to the jury, and I stated that, in my opinion, the rent was not payable to White, for he had assigned it. Nor was it argued even before us. But I have no doubt the allegation is a material one, and must be strictly proved; and it was disproved—*Ireland v. Johnson* (1 B. N. C. 162).

The special facts, which shewed *how* the rent was payable to McLean, and *how* it was there was no rent payable by the plaintiff to McLean, as, for instance, in this case, that the plaintiff had paid White the landlord before he had any notice of the rent having been assigned, should, perhaps, have been expressly stated—*Waddilove v. Barnett* (2 B. N. C. 538); *Johnson v. Jones* (9 A. & E. 809).

Upon this ground there should certainly be a new trial; but, if upon this point, it should be on payment of costs, because the objection was not raised at the trial, nor taken or argued upon when it was mentioned.

But, as the finding of the jury was almost perverse on the question of notice, for it is perfectly clear the plaintiff had notice of the assignment, the new trial should be on the terms of the costs abiding the event.

As to the notice, I put the question to the jury to say whether the plaintiff had notice of the assignment when he gave the notes, or at any time before the distress; and they found the plaintiff had not notice before the distress, and that at that time the whole of the notes or rent had been paid by the plaintiff to White, or to the holder of the notes.

Upon this finding we are precluded from enquiring into the effect of the mere giving of notes, and calling that a

payment of rent, or of the effect of giving notes in advance of rent not then due. The statute of 4 Anne, ch. 16, sec. 10, protects *payments* made by tenants before notice; and payment means "payment in due course, and not by anticipation."—*Burbridge v. Manners* (3 Camp. 193).

There can properly be no payment before the day: it should be pleaded as payment at the day—*Sturdy v. Arnaud* (3 T. R. 599). This point was not discussed, but it is an additional reason why the defendants should get the advantage of it, which they have not at present by reason of the very strange finding of the jury.

I should simply have concurred in the judgment of my learned brother, who had prepared it, if it had not been that the rule represents me as having directed the jury, among other things,—1. That White was the owner of the rent, and entitled to receive and distrain for it; 2. That McLean was not entitled to distrain for it; and, 3. That there could be no distress, if a note were taken for the rent;—for in no respect did I charge the jury in this manner.

I did not say White was the owner of the rent, or entitled to distrain for it. I gave no direct opinion upon it, although I had then, and for long before then, entertained the opinion that the assignee of rent, the owner of a rent-seck, could distrain for it in his own name; for so I read the statute of George the Second and the comments of the writers upon it. But I knew this view was not considered as perfectly free from doubt, and therefore I refrained from positively committing myself.

But what I did say at the trial shewed what my opinion was, for I suggested that the allegation in the declaration, that the rent was payable to White, was not proved, but the contrary, for it was payable to McLean; and I requested the jury to say whether the plaintiff had or had not notice of the assignment of the rent to McLean; all of which would have been quite unmeaning if the rent were still White's, or if McLean could not in any case distrain for it.

But I did tell the jury that, for the mere purpose of the trial, they might assume the rent did belong to White,

because the question was afterwards to be considered by the court.

Nor did I say there could be no distress if a note were taken. Such a thing did not occur at the trial at all. The effect of giving a note is to suspend the remedy by distress during the currency of the note ; but this has nothing to do with the facts of this case, for the note given was due before the distress. I expressed no opinion whether a note could be considered payment under the statute of Anne. I have now suggested this for future consideration.

If I had observed the terms of the motion I would not have assented to the rule in its present form.

I think on the merits there should be a new trial, costs to abide the event.

Rule absolute for new trial, costs to abide the event.

EDINBURGH LIFE ASSURANCE CO. V. BARNHART.

Statutory conveyance—Easements—Implied grant.

One J. S., being owner of the east half of one, and the west half of an adjoining, lot, by deed, expressed to be in pursuance of the act respecting short forms of conveyances, conveyed to G. S. in fee the west half, without express mention of any rights, easements, &c. At the time of the conveyance there were on the west half a saw mill and factory, which then and for some years prior, during unity of title to both lots, were driven by the waters of a river, which was dammed back, to form a pond on both lots, by a dam and embankment extending on to both. At the time of conveyance, also, there was on the west half a building intended for a grist mill, ready for the reception of machinery, and the embankment of the mill pond was partly cut through to carry the water therefrom to another pond partly begun, from which the grist mill was to be supplied. After the conveyance G. S. cut through the embankment at the place where the cutting had been begun, carried the water required from one pond to the other by a flume, and thus worked the grist mill which he had completed, and which could not otherwise have been worked. By this he diverted the water from the first pond and from the east half to a greater extent than it had been diverted before the conveyance. Such diversion and working of the mill were with the *parol* license of J. S. The cutting, flume and grist mill pond were all on the west half, and the water was returned from the mill to the river below the east half.

Held, that, apart from any question of implied grant, by necessity, as the act referred to included all easements, &c., used or enjoyed with the lands granted, there was an express grant of the right or easement to maintain the dam and to enter for purposes of repair on the east half, and to dam back thereon for the purposes of the *saw mill and factory*, to the same extent as before the conveyance. But,

Held, per *A. Wilson, J., Richards, C. J.*, concurring, though absent, that no right or easement passed in respect of the grist mill; and also, that the parol license was revocable; but that plaintiffs, the mortgagees of *G. S.*, would be entitled in equity to restrain *J. S.* and those claiming under him from interfering with the right claimed respecting the grist mill.

Per *J. Wilson, J.*, that there passed by implied grant all the easements claimed, including those in respect of the grist mill.

The declaration stated that the plaintiffs sold by public auction certain land, of which they were seised in fee, with the mills thereon and the easements thereto belonging, including the right or easement of using on the lands and damming the water of the river Credit for the purposes of the mills on certain other lands; and the defendants became the purchasers thereof for \$9,171 46, under certain conditions; and the plaintiffs alleged that all conditions were performed to entitle the plaintiffs to maintain the action; and although the defendants paid part of the purchase money, yet the defendants had refused to complete the sale and to pay the residue of the purchase money.

The second count was for money payable for lands, &c., sold and conveyed.

The defendants pleaded:

1. That the lands sold were the west half of lot 2 in 3rd concession, west of Hurontario street, in Chinguacousy, and that the right or easement of using on the land and damming back the water was that of damming back the water upon and overflowing part of number 3, in the 3rd concession, and part of number 2, in the 4th concession, west of Hurontario street, in the said township; and that at the time of the sale the plaintiffs had not such right or easement.

2. That for the purpose of using on the said land and damming back the water, there were erected, at and before the sale, a certain dam and embankment situated partly upon the said land, and extending to and upon number 2, in the concession aforesaid, and for the purposes aforesaid it was necessary to maintain and keep the dam and embankment in proper repair; and from time to time, in order to repair when repairs were required, it was necessary to enter upon part of number 2 in the 4th concession; and the right so to enter was one of the easements in the declaration

mentioned; and that the plaintiffs had not at the time of the sale the right to enter from time to time in order to repair the dam and embankment when necessary.

3. That the right which the plaintiffs sold was to divert part of the water of the river Credit from its natural course over number 2 in the 4th concession, and to lead it over the land sold, and to turn it into the river at a point below number 2 in the 4th concession; and that the plaintiffs had not such right at the time of the sale.

4. That, at the time of the sale, the plaintiffs were entitled to the land sold in fee simple in possession, by a conveyance from one Jacob Snure to one George Wm. Snure, and by a conveyance from George William Snure to the plaintiffs; that, at and before the time of the conveyance from Jacob to George Snure, to wit, on the 18th of November, 1858, there were on the land a saw-mill and woollen factory and certain machinery therein contained, driven by the water of the river Credit; that, in order to use the water for that purpose, it was necessary to raise and dam back the water upon and to overflow part of number 3 in the 3rd concession, and part of number 2 in the 4th concession aforesaid; that, at the time of the sale, there was a grist-mill upon the land sold, with the machinery therein contained, driven by the water of the said river, and, in order to use the water for that purpose, it was necessary to raise and dam back the water upon and to overflow the said lots three in the third and two in the fourth concessions, to a greater height and extent than the same, at and before the time of the conveyance from Jacob to George Snure, were and usually had been raised, dammed back and overflowed; and that it was part of the terms and conditions of sale that, if the plaintiffs had not at the time of sale either the right to raise, dam back and overflow the water upon the last-mentioned land to such height and extent as might be requisite for the full and proper use of the grist-mill and machinery, together with the saw-mill and factory and *other* machinery, or the right to raise, dam back and overflow the water to such height and extent as the same, at and before the sale,

were and usually had been raised, dammed back and overflowed for the purpose of the mills, factory and machinery, the sale should be void; and the defendants said that at the time of the sale the plaintiffs had neither of such rights.

The 5th plea was the same as the 4th, excepting that it referred to the *diversion* instead of the damming back of the water.

The plaintiffs took issue upon so much of the plea as alleged that the plaintiffs had not the rights or easements therein respectively mentioned, and upon so much of the 4th plea as alleged it was necessary to raise, dam back and overflow the lands therein named to a greater height and extent than the same, at and before the conveyance from Jacob Snure, had been actually raised, dammed back and overflowed; and also upon so much of the 5th plea as alleged that it was necessary to divert the water to a greater extent, &c.

The cause was by consent referred by judge's order to arbitration.

The arbitrator found that on the 30th August, 1834, and from thence until the conveyance from Jacob Snure to his son George was made, the said Jacob Snure was seised in fee of the west half of number 2 in the 3rd concession aforesaid, and also of the east half of number 2 in the 4th concession aforesaid:

That, when Jacob Snure first became seised of these lots, there was standing on the west half of 2 in the 3rd concession a saw-mill, which was in the same position as the one now in operation, and also a dam and embankment partially on the west half of 2 in the 3rd concession, and partially on the east half of 2 in the 4th concession, which was in the same position as the one referred to in the pleadings:

That at that time the dam caused the water of the river Credit to overflow into the east half of 2 in the 4th concession, and into a corner of the west half of 3 in the 3rd concession, consisting of about three acres, of which one Joseph Bratt was then seised in fee:

That from the 30th of November, 1834, till the 20th of

April, 1844, Jacob Snure and Joseph Bratt were jointly interested in the working of the saw-mill, though the fee was in Jacob Snure, and two or three years before the 20th of April, 1844, from which time until the conveyance was made by Jacob Snure to his son George the woollen factory was worked by Jacob Snure alone, and which factory was the one now standing on the land :

That from the 30th of August, 1834, until the sale to the defendants, the waters of the river Credit had for the purposes of the mill and factory been dammed back and raised above the natural level of the stream, so as to form a certain head or fall of water at the said mill and factory, to which the waters were conveyed by a flume or artificial duct ; and during all that time the said mill and factory were driven and used by means of the water flowing through such artificial duct, and the same could not have been otherwise driven or used by the waters of the said river :

That, on the 25th of April, 1844, Joseph Bratt conveyed to Jacob Snure, in fee, the said three acres of the west half of 3 in the 3rd concession, which were then overflowed by the dam, and which was all of the west half of 3 that had at any time since been overflowed ; and that the said Jacob Snure continued seised of the said three acres to and until the time when he made the conveyance to his son George :

That from the year 1841 until the conveyance was made to George William Snure, the dam and flume had been calculated for damming back the waters of the said river to a head of seven feet, and when necessary the water had been dammed up to that extent :

That on the 18th of November, 1858, Jacob Snure conveyed to his son George in fee the west half of 2 in the 3rd concession :

That at this time there was standing on the west half of 2 in the 3rd concession a building intended for a grist-mill, which was the grist-mill in the pleadings mentioned. The building was then ready for the introduction of the machinery, and the bank of the original mill-pond, by which

the saw-mill and woollen factory were supplied with water, was partially cut through for the purpose of carrying the water from the mill-pond by a flume or artificial duct to a mill-pond, from which the grist mill was to be and had from the time of its completion been supplied :

That, at the time of the conveyance to George William Snure, part of the embankment of the last mentioned mill-pond had been completed :

That, after the said conveyance, George William Snure completed the grist-mill and last mentioned mill-pond, and diverted the water from the original mill-pond and from number 2 in the 4th concession, and the water of the river was necessarily diverted from the said pond and from number 2 in the 4th concession, to a greater extent than before the completion of the grist-mill; and George Wm. Snure thereby worked the grist-mill, which could not otherwise have been worked, with the license of Jacob Snure; but such license was only by *parol*, unless, under the circumstances above stated, a license could be inferred from the conveyance to George Snure :

That the right so to divert the water from the original mill-pond, for the purpose of working the grist-mill, was the right to divert in the pleadings mentioned :

That it would not be possible for the owner of number 2 in the 4th concession to use the water on that lot for milling purposes, unless he had a right to carry the same from above the dam, before referred to, on to the said lot :

That, after the erection of the grist-mill, the water of the river had not been dammed back to a greater extent than at times it was dammed back by Jacob Snure, as of right, from the year 1844; but, from the time the grist-mill had been in operation, the head of water had been kept up more regularly, and the land had been more frequently overflowed than before that time; but no land had been overflowed since that time, which had not been at times overflowed before the erection of the grist-mill :

That such head of water was sufficient to drive both the

saw-mill and woollen factory, and the grist-mill also, in ordinary states of the water; although, at low water, it had occasionally been found necessary to stop the saw-mill to permit the grist-mill to have a full supply of water :

That, if the owner of the east half of 2 in the 4th concession, had, notwithstanding the premises, a right to tap or cut through the embankment of the main mill-pond, and thereby divert from the main mill-pond all water not required for the saw-mill and woollen factory, without reference to the grist-mill, it would be possible to turn such water to beneficial account for the owner of the said east half of 2 in the 4th concession :

That the value of the mills and the privilege of working the same, assuming that the privilege was conveyed with the lot by Jacob Snure to his son George, would amount to two-thirds of the value of the whole lot, or twice the value of the residue of the lot, without such mill and privilege; and the value of the grist-mill was one-half of the whole value of the mill property and privilege :

That on the 16th of December, 1861, George Wm. Snure conveyed in fee simple, by way of mortgage, to the plaintiff, the whole of the west half of number 2 in the 3rd concession, with a power of sale on default; the said conveyance and also the one from Jacob Snure to George being made in pursuance of the act respecting short forms of conveyance, and conveying to the grantees, respectively, in fee simple, the said half lot, without any exception; and the sale by the plaintiff to the defendant having been made under the said power of sale.

The arbitrator then awarded that, if the court were of opinion under these circumstances, that the plaintiffs by the conveyance from George William Snure acquired all the rights claimed by them on the issues joined on the plea on this action, the plaintiffs were entitled to succeed on all the issues, and he assessed the damages to be paid to them at \$8617 :

That, if the court were of opinion the plaintiffs had not the right to dam back the water of the river at all, the

defendants were entitled to succeed on the issues to the first and fourth pleas; but, if the court were of opinion that the plaintiffs had acquired any right to dam back the water, then he awarded that the plaintiffs were entitled to succeed on the issue joined on the fourth plea:

That, if the court were of opinion that the plaintiffs acquired by the conveyance from George Wm. Snure to them no right to either divert the water from the main mill pond, and thereby to deprive the east half of 2 in the 4th concession of the use of the water to any extent, the defendants were entitled to succeed on the issues joined on the third and fifth pleas; but, if the plaintiffs acquired any right to divert the water at all, that the plaintiffs were entitled to succeed on the issue on the third plea:

That, if the court were of opinion that the plaintiffs acquired by the said conveyance no right to enter on the east half of 2 in the 4th concession, the defendants were entitled to succeed on the issue joined on the second plea; but, if the plaintiffs did acquire such right, then the plaintiffs were entitled to succeed on that issue:

That, if the court were of opinion that, although the plaintiffs acquired the right to dam back the waters of the river, but not to such an extent as was necessary for the full enjoyment of the grist-mill, or to such an extent as the same were, at the time of the sale by George Wm. Snure to the plaintiffs, and theretofore had been usually, dammed back, the defendants were entitled to succeed on the issue joined on the fourth plea:

That, if the court were of opinion that, although the plaintiffs acquired a right to divert the water to some extent, but not to the extent necessary to drive the grist-mill, or to the extent that the same at the time of the sale from George W. Snure to the plaintiffs and theretofore had been usually diverted, then the defendants were entitled to succeed on the issue joined on the fifth plea; but, if the court were of opinion the plaintiffs had either of such rights, then that the plaintiffs were entitled to succeed on the issue on the fifth plea.

The case was argued in Hilary Term last.

A. Leith, for the plaintiffs :—

It is conceded that by reason of the unity of title the Statute of Limitations cannot affect the questions.

The easements referred to were of necessity, and apparent and continuous at the time of the grant by Jacob Snure to George Snure, and therefore passed by implication: *Pyer v. Carter*, 1 H. & N. 917; *Gale on Easements*, 3rd ed. 21; *Suffield v. Brown*, 10 Jur. N. S. 111; which latter case only denies the right to *reservations* by implication.

As easements of necessity they were not extinguished by unity of possession, or if so, they would revive on a new grant: *Sury v. Pigott*, Tud. Lg. Ca. 127, 182; *Pheysey v. Vicary*, 16 M. & W. 484; *Gooderham v. Routledge*, 10 Grant 395; *Gale*, 3rd ed. 473.

Under the act as to short conveyances the rights passed by express grant, as appurtenant to, or used and enjoyed with, the property: *Barlow v. Rhodes*, 3 Tyr. 280; *Morris v. Edginton*, 3 Taunt. 24; *James v. Plant*, 4 A. & E. 749; *Pheysey v. Vicary*, 16 M. & W. 484; *Ruttan v. Wynans*, 5 C. P. 379; *Shepp. Touch.* 89, 100; *Dand v. Kingscote*, 6 M. & W. 174.

So far as respects the grist mill, even though no rights or easements passed impliedly or expressly by reason of its non-completion, still, as the grantor had given a license to work it and divert the waters, it was, though by part, irrevocable, as having been executed, and requiring only to be executed on the lands of the licensee; which last fact distinguishes this case from *Wood v. Leadbitter*, 13 M. & W. 838, and other cases. The effect of the license was to extinguish a right the grantor had to the water, not to convey an interest in lands to the grantee: *Winter v. Brockwell*, 8 East. 308; *Liggins v. Inge*, 7 Bing. 682, confirmed by *Alderson, B.*, in *Wood v. Leadbitter*, 13 M. & W. 855; *Davies v. Marshall*, 10 C. B. N. S. 697, per *Willes, J.*, p. 704, and *Williams, J.*, p. 711; *Blood v. Keller*, 11 Ir. C. L. N. S. 124; *Brown v. Windsor*, 1 Cr. & J. 20; *Harvey v. Reynolds*, 12 Price 724; *Compton v. Richards*, 1 Price, 27.

Perry v. Fitzhowe, 8 Q. B. 757, is distinguishable, and see *Gale on Easements*, 69.

After such license executed the licensor cannot interfere, and he would be restrained in equity: *Colching v. Bassett*, 32 Bea.; *Davies v. Marshall*, 10 C. B. N. S. 697; *Duke of Devon v. Eglin*, 14 Bea. 530; *Hervey v. Smith*, 22 Bea. 299; *Sury v. Pigott*, Tud. Lg. Ca. 143.

M. C. Cameron, Q.C., contra:—

The deed from Jacob Snure only speaks of lands, and the easements claimed cannot be of necessity, as the land can be enjoyed without them, and the statute will not pass that which it was not intended to pass, and which apart from the statute would not impliedly pass.

The grist-mill not being in existence at the time of the grant, there could be no easements in respect of it, and consequently the diversion of the water for its purposes was beyond any express or implied grant, and a prejudice to the land retained by the grantor: *Davies v. Williams*, 16 Q. B. 546.

The parol license was insufficient and revocable: *Wood v. Leadbitter*, 13 M. & W. 838; *Winship v. Hudspeth*, 10 Ex. 5.

By the grant of a mill the water will not pass: *Tucker v. Paren*, 7 C. P. 269.

There was no right to maintain the embankment or overflow at all on the east half, but it is conceded that, if such rights existed, the right to enter to repair followed: *Earl Cardigan v. Armitage*, 2 B. & C. 197.

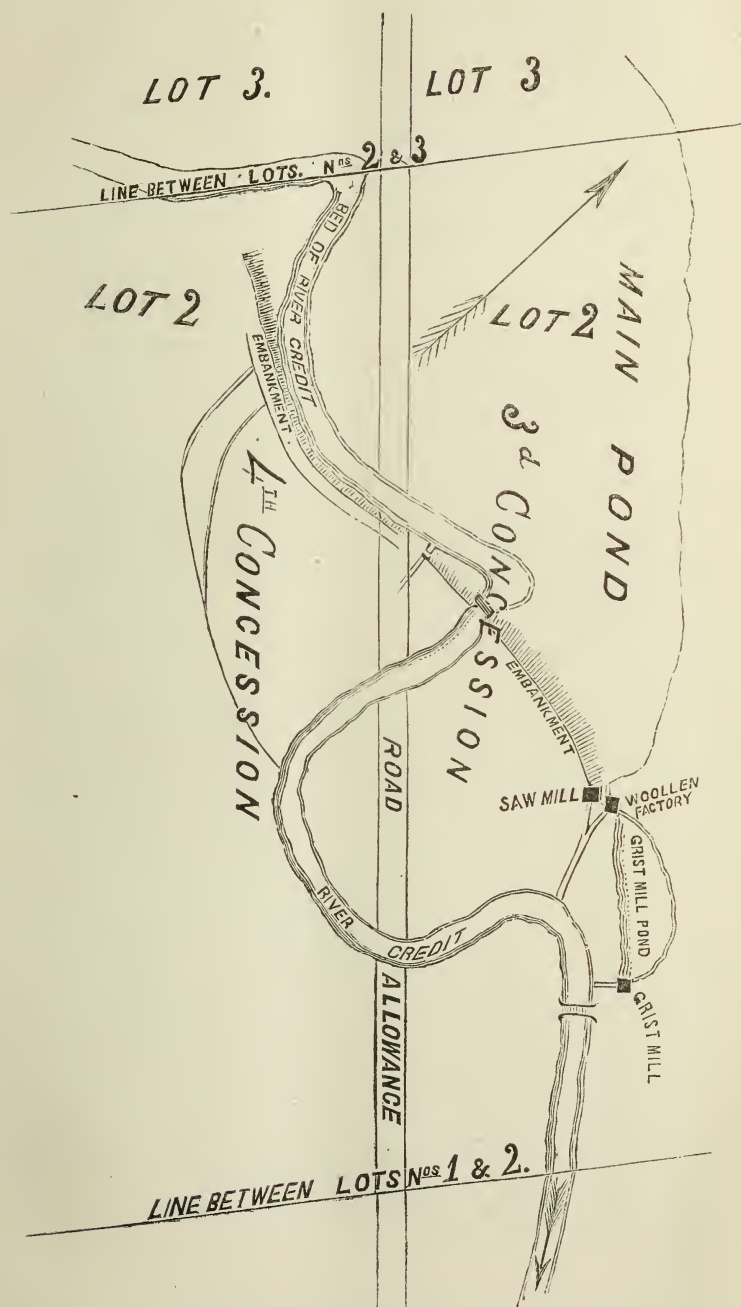
He cited, also, *Gale on Easements*, 93; *Frankum v. Earl Falmouth*, 2 A. & E. 452.

Leith, in reply:—

No case has been cited, or exists, shewing that a parol license has been held revocable which has not either been unexecuted or required to be exercised on the lands of the licensor, and on these grounds *Wood v. Leadbitter* and the other cases cited are distinguishable.

A. WILSON, J.—It appears that from the 30th of August, 1834, till the 18th of November, 1858, Jacob Snure was seised in fee of the west half of 2 in the 3rd concession,

The following Plan will serve to illustrate the Premises, with the cutting and diversion in question :



and the east half of 2 in the 4th concession, and that from the 25th of April, 1844, until the 18th of November, 1858, he was also seised in fee of the portion of about three acres of number 3 in the third concession, which was overflowed by reason of the mill-dam and embankments in question. He was, therefore, seised in fee of all the lands at all affected by this suit for many years before he parted with the particular lot in question, the west half of 2 in the 3rd concession, to his son George Snure.

The saw-mill only was erected before the year 1841 or 1842. About that time the woollen factory was put up.

The grist-mill was erected before the sale to George Snure, all ready for the machinery; but it was not completed or worked while Jacob Snure was seised of the land. After the purchase by George Snure he completed the grist-mill and all the works connected with it, and diverted the water for that purpose, and the same works have been maintained, and the water has continued to be diverted from that time forward.

All of these mills are built upon the land sold to the defendants.

The dam and embankments, which were used before the grist-mill was put up, were made when Jacob Snure first became seised of the land, which would be on or before the 30th of August, 1834, and they stood partly on the west half of 2 in the 3rd concession, and partly on the east half of 2 in the 4th concession, and they kept the water back at that time, so as to overflow on to the east half of 2 in the 4th concession, and as far back as to overflow the three acres or thereabouts of number 3 in the 3rd concession. What height or head of water there was at the mills at that time, and until 1861, does not appear; but from the year 1841 the dam and flumes had been *calculated* for damming back the waters of the river to a head of seven feet, and when necessary they had been dammed back to that extent.

What change, if any, was made in the dam and embankments in 1841 does not appear; for the statement, that the

dam and flumes were in that year calculated for raising a head of seven feet of water, does not convey any clear idea on this point: there may have been some change, but it may not be material to consider it, for Jacob Snure was then the owner of all of the property which was affected.

In November, 1858, when the sale was made by Jacob Snure to George, preparations had been made for running the grist-mill: the bank of the original mill-pond was partially cut through for the purpose of carrying the water by a flume from the original mill-pond to a mill-pond from which the grist-mill was to be and has since been supplied, and part of the embankment of the grist-mill was then completed, and has since been completed by George Snure.

The water has not been dammed back since the erection of the grist-mill to a greater extent than at times it was dammed back by Jacob Snure, as of right, from the year 1841; nor has any land been overflowed since the erection of the grist-mill, which was not at times overflowed before that erection; but, from the time the grist-mill has been in operation, the head of water has been kept up more regularly, and the land has been more frequently overflowed than before that time.

After the completion of the grist-mill George Snure diverted the water from the original mill-pond and from number 2 in the 4th concession, and the water of the river was necessarily diverted from the original pond, and from number 2 in the 4th concession, to a greater extent than before the completion of the grist-mill.

George Snure, after his purchase in November, 1858, worked the grist-mill with the license of Jacob Snure; but it was by a parol license only, unless the deed to George Snure can be held to have vested the right in him.

The diversion of water complained of is the diversion for the purpose of the grist-mill.

At the time that Jacob Snure sold to George there was no easement existing in law relating to the mills or lands affected; for Jacob Snure was the legal and absolute owner

in fee of the whole property in any way affected by the water and the rights in question.

When he sold to George Snure he sold to him the west half of 2 in the 3rd concession, according to the short form of conveyance, established by what is now ch. 91 of the Consol. Stat. for U. C., and there was no exception contained in the conveyance; and by that statute the deed, therefore, included all mounds, waters, water-courses, privileges, easements, profits, hereditaments and appurtenances to the land belonging, or in anywise appertaining, or with the same held, used, occupied and enjoyed, or taken or known as part or parcel thereof.

It may be that the water, water-courses, dam and embankments, which were not upon the west half of 2 in the 3rd concession, the parcel of land actually sold, did not *belong* or *appertain* to the land—*Maitland v. Mackinnon* (1 H. & C. 607), and that they were not taken or known as part and parcel of it; but they were unquestionably *held, used, occupied, and enjoyed* with the land, and therefore passed with the half lot. But whether they passed as a *parcel*, or as an easement, is perhaps of no consequence: the plaintiffs contended for no higher right than as an easement, and the defendants seem content to take the right to that extent, which is, perhaps, the full right. The statute says the deed “shall be held and construed to include” the houses, ways, waters, &c., therein enumerated; so that the question now in all cases should, perhaps, properly be “parcel or no parcel.”

By the words “therewith used and enjoyed” an easement existing in point of fact, though not existing in point of law, will pass by grant; and by such words an easement may be created, or, if it existed before and became extinguished, it may be re-created: *Plant v. James* (5 B. & Ad. 791); *James v. Plant*, in Error (4 Ad. & E. 749); *Clements v. Lambert* (1 Taunt. 205); *Barlow v. Rhodes* (3 Tyr. 280); *Whalley v. Thompson* (1 B. & P. 371); *Pheysey v. Vicary* (16 M. & W. 484); *Wardle v. Brocklehurst* (1 El. & El. 1058).

I do not doubt, then, that on a sale of the half lot, the deed of which by the statute includes also the waters, water courses, easements, &c., before mentioned, and upon which mills stood and were in operation and formed a very valuable portion of the whole value of the land, the rights and easements actually and rightly existing either in fact or in law at the time of the sale passed with the land.

When Jacob Snure, therefore, sold to George Snure, as before mentioned, the deed he made passed to the grantee the mill works and embankments upon the east half of number 2 in the 4th concession, or the right to use them; and the right to flow the water back upon that half lot, and upon the three acres of number 3 in the 3rd concession, to the extent that the water was then and had theretofore been flowed back by Jacob Snure, and the right to divert the water of the river for milling purposes, to the extent that the same was then and had been theretofore diverted by Jacob Snure for such purposes; and the deed to George Snure may be explained by the state of the premises at the time the deed was made, and the mode in which they were then and had been previously enjoyed: *Hall v. Laud* (1 H. & C. 676). And when George Wm. Snure conveyed to the plaintiffs, his deed passed the like rights to them, and they had the power, therefore, to transfer the same rights to the defendants. If Jacob Snure had sold to George Snure the east half of 2 in the 4th concession, in the like unqualified form in which he sold to him the west half of 2 in the 3rd concession, George Snure might have cut down the embankment upon 2 in the 4th concession, and Jacob Snure could not legally have complained, because, having disposed of the servient tenement, without reserving his rights upon it for the benefit of number 2 in the 3rd concession, upon which the mills stand, he would have discharged it from the servitude, and the purchaser would have had the right to do as he pleased with his property, without regard to the former privileges or powers which the vendor had exercised, or had the right of exercising, upon it: *Suffield v. Brown* (10 Jur. N. S. 111).

But if the sale had been of the dominant tenement, as in this case, a very different question would have arisen, the question which has now arisen, and which, I think, entitles the plaintiffs, as against the vendor, to the benefits of the servitudes which were then attached to the land and mills, and which are necessary for their proper enjoyment.

But a further question has to be considered, the most material one in value to the plaintiffs, and which is, whether George Snure was entitled to withdraw from the river a greater quantity of water than had been withdrawn from it up to and at the time when he made his purchase.

It seems plain he could not have claimed this right by reason of his deed, and that he could have claimed it only by the license, the parol license and acquiescence of his father, Jacob Snure, the owner of the land.

The infringement on Jacob Snure's rights was, by diverting a larger body of water from the river and from number 2 in the 4th concession, and across this lot, than had been theretofore diverted from the river and lot and across it, and by continuing such diversion. It was not by any works which George Snure had done or did do, as all he did was done upon his own land, and for which he did not require the license of Jacob Snure, and could not have been hindered from doing; but the result and necessary consequence of the work which he did do was to cause the abstraction of the larger quantity of water that is now in dispute.

If this claim or right of George Snure cannot be distinguished from the easement of light, in *Winter v. Brockwell* (8 Ea. 308), then that case is an authority that Jacob Snure cannot now revoke the license, which he appears to have given to George Snure, to do the work and of necessity to cause the additional diversion of water; and if it cannot be distinguished from the mere abstraction of water, when it was not carried over the licensor's land, as in *Liggins v. Inge* (7 Bing. 682), then that case is a clear authority that Jacob Snure cannot now revoke or weaken his license.

I think the claim in this case is of a higher and different character than was made in *Liggins v. Inge*. The right claimed here is not only to divert the water from Jacob Snure, but to carry it and to continue to carry it over his land, and, as a consequence, to enter upon his land for the purpose of repairing and maintaining the works erected thereon.

Tindal, C. J., said in that case: "If it was necessary to hold that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shewn to have passed from the plaintiff's father to the defendants under the license, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow; for it cannot be denied that the right to the flow of the water formerly belonging to the owner of the plaintiff's mill could only pass by grant as an incorporeal hereditament, and not by parol license. But we think the operation and effect of the license, after it has been completely executed by the defendants, was sufficient, without holding it to convey an interest in the water. * * *

We do not consider the object, and still less the effect, of the parol license to be, the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted the water no longer for the purposes of his mill, &c.;" and from this language it appears the Chief Justice felt the difficulty of supporting what was manifestly the justice of the case, and that he disposed of it upon a ground not at all applicable to the facts of this case.

The case of *Winter v. Brockwell* may also be distinguished on the same grounds upon which *Liggins v. Inge* is not applicable. The plaintiff there merely gave up his right to the access of air and light into his own window: nothing was to be done or exercised upon his property, as in this case.

Hewlins v. Shippam (6 B. & C. 221), *Wood v. Leadbitter* (13 M. & W. 838) and many other cases shew that a parol license of this nature is not effectual without a deed: it emphatically lies in grant.

I do not see why Jacob Snure cannot at any time prevent this larger quantity of water from passing over his land, as in *Roberts v. Rose* (1 Law Rep. Exch. 82).

I do not say that George Snure had not the right to use the water from the original pond for the grist-mill, or for any other purpose beside the use of the saw-mill and woollen factory, so long as he did not consume more water than had been accustomed to pass into the pond before and at the time of his purchase; for if there had been waste water, he would have been at liberty to utilize it for any purpose he pleased: *Wardle v. Brocklehurst* (1 El. & El. 1065, Ex. Ch.); but the finding of the arbitrator is, that more water was taken from the river by reason of the working of the grist-mill than there had been before it was put into operation, and this excess of water taken rests only on the verbal license of Jacob Snure, the owner.

I have no doubt (so far as I can venture to form an opinion on Chancery law) that the plaintiffs are entitled to an injunction against Snure and all persons claiming under him adversely to the plaintiffs, to restrain him and them from interfering with the flow of the water, which is necessary for the full enjoyment and proper working of the grist-mill.

Davies v. Marshall (10 C. B. N. S. 697) and *Ramsdem v. Dyson* (12 Jur. N. S. 506, H. L.), and many of the other cases cited, establish this.

But the plaintiffs have not such a right yet, assuming they could use it effectually at law in an action like the present, if they had obtained it; and their rights must be settled here without regard to what they may or may not be able to obtain in a court of equity, when such a recourse and relief form no part of the questions before us.

The claim made to this extra water, never had, or taken, or

used, or enjoyed, or known, or taken, as a part or parcel of the land granted, but taken and used for the first time after the making of the deed, is, in my opinion, just the same as if there had been no water at all taken before the making of the deed, and as if a single mill, and that an incomplete one, had been standing on the land at the time of the sale, and the grantee had completed it and abstracted the water for the first time after the making of the deed; and this, I think, such a grantee could not, under a deed like the one to George Snure, do. If he could, when was he to do it? If he could do it one day after his deed, he could do so in one year after it; and if in one year, he could do it also in ten years after; and there would be strong objections to such a claim, and such an exercise of it being held to be valid at law.

Nor do I think, upon the present finding of the arbitrator, that the plaintiffs can exercise this right to the water for the grist-mill, although they do not overflow more land than was done before.

Nor do I think that the right to overflow the three acres on number three, as against Jacob Snure, as being the revival of an old easement, makes any difference in this case. I come, therefore, to the conclusion that George Snure did not, while owner of the west half of number 2 in the 3rd concession, acquire the legal right to abstract or divert from the east half of number 2 in the 4th concession, more of the water of the river Credit than there was diverted and abstracted from it when he became the purchaser of the west half of number 2 in the 3rd concession, in November, 1858; and that the plaintiffs in law possessed and acquired the rights only which George Snure had and possessed, and no more.

There is no doubt that whatever works the plaintiffs had the right to maintain on the east half of number 2 in the 4th concession, they had the right of entry upon that lot for the purpose of repairing them: the authorities are quite in accordance with the reason and necessity of this rule.

According to my view of the case, and upon the finding of the arbitrator, the issues should be disposed of as follows:

The first issue should be entered for the plaintiffs, because they had acquired some [any] right to dam back the water upon the east half of number 2 in the 4th concession, and upon part of number 3 in the 3rd concession.

The third issue should be entered for the plaintiffs, because they did acquire some [any] right to divert the water from the main mill-pond, and to deprive the east half of number 2 in the 4th concession, to some [any] extent.

The second issue should be entered for the plaintiffs, because they did acquire the right to enter on the east half of number 2 in the 4th concession, for the purpose in the second plea mentioned.

The fourth issue should be entered for the defendants, because the plaintiffs did not acquire the right to dam back the waters of the river to such an extent as the same was at the time of the sale to the plaintiffs; and the fifth issue should be entered for the defendants with respect to additional diversion, upon the same grounds as they are entitled to succeed on the fourth issue.

J. WILSON, J.—The question in this case is, whether the plaintiffs have such a title to the lands, mills and waters in the pleadings mentioned, as the defendants are bound to take under the agreement set forth in the declaration.

One Jacob Snure, under whom the plaintiffs claim, in the year 1834 owned the east half of lot number 2 in the 4th concession, and the west half of lot number 2 in the 3rd concession of the township of Chinguacousy.

On the west half of two in the third concession there were then a saw-mill and a dam, on the River Credit. From this dam embankments extended on both half lots, so that at the mill there was a head of seven feet of water. The dam, with its embankments, made a pond, chiefly on the west half of lot number two in the third concession, but overflowed a part of the east half of two in the fourth concession, and

about three acres of the west half of lot three in the 3rd concession, then belonging to one Joseph Bratt, who conveyed it in April, 1844, to Jacob Snure. In 1841, and before this conveyance was made, a woollen factory had been built on the west half of lot number two in the third concession. From this time until the 18th of November, 1858, Jacob Snure was the undisputed owner of these lands and of the waters and easements necessary for the saw-mill and woollen factory, and had himself during this period carried them on.

On the 18th of November, 1858, Jacob Snure conveyed to his son George Snure, in fee, the west half of lot number two in the third concession, by a conveyance under the act to facilitate the conveyance of real property, 9 Vic. ch. 6. In this conveyance no mention is made of the mills or water power: the land is described by the number of the lot. At this time the saw-mill and woollen factory were in operation, and a building intended for a grist-mill was ready to receive the machinery. The bank of the original mill-pond, from which the saw-mill and woollen factory were supplied with water, was partially cut through for the purpose of carrying the waters from the mill-pond to another pond, from which the grist-mill was to be supplied, and from the time of its completion until the sale from the plaintiffs to the defendants, it has been so supplied with water. At the time of the conveyance from Jacob Snure to his son George, part of the embankment of the last mentioned pond had been made, which George completed. He finished the grist-mill, diverted the water from the original mill-pond to a greater extent than before the completion of the grist-mill; but, unless in a dry time, there was water enough to drive all. In this way George Snure worked the grist-mill, with the parol license of Jacob, which could not otherwise have been worked, unless by the conveyance such an easement passed as enabled him to work it.

On the 16th of December, 1861, George Snure conveyed, by way of mortgage, the whole of the west half of lot num-

ber two in the third concession, to the plaintiffs in fee, without any exceptions, by a conveyance under the act respecting short forms of conveyances (Consol. Stat. U. C., ch. 91). This mortgage contained a power of sale, under which the sale from the plaintiffs to the defendants, mentioned in the declaration, took place.

Now, the first point brought under our consideration is, what passed under the conveyance from Jacob to George Snure of land described as the west half lot number two, in the third concession; for nothing is said of the mills or water-power in the deed.

The third section of the Consol. Stat. Act for U. C., ch. 91, enacts, that every such deed, unless any exception be specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, under-woods, mounds, fences, hedges, ditches, ways, *waters, water-courses*, rights, liberties, privileges, *easements*, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised belonging, or in any wise appertaining, or with the same demised, held, *used, occupied and enjoyed*, or taken or known as part or parcel thereof.

The fourth section enacts, that the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal.

We were pressed at the argument, on the part of the defendants, with the consideration that there was no easement which could be said to belong to these mills at the time Jacob Snure conveyed to George Snure, because there had been a unity of possession of them, and all that was necessary for their beneficial operation. This, however, is but asserting that Jacob owned the whole property; the land upon which the dam and mills had been erected, the land upon which part of the embankment was constructed, and the land covered by the whole mill-pond. It will not be necessary, in the view I take of the case, to enquire whether any such easement ever existed: it will be enough

to find that Jacob had the whole property in himself when he sold the part in question to George. Nor will it be necessary here to notice another distinction which was also pressed upon us on the argument, on behalf of the plaintiffs, that the rights claimed by them were easements of necessity; for all such easements when properly considered, will, I think, be found nothing more than grants by implication; for that is granted by implication, without which the direct grant cannot be beneficially enjoyed; 1 Wms. Saund, 323*a*, *note*. Our attention was directed specially to the consideration, that this case, so far at least as diverting the water for the grist-mill, came within that class of cases where a party, having given a parol license to do certain acts which the other party had done, involving expense, was not permitted to revoke that license. It is stated, as part of the case, that whatever George had done in regard to the work connected with the grist-mill, had been done by the parol license of Jacob, and as he did expend money the license cannot be revoked to deprive him of the benefit of his expenditure. We were referred to the cases of *Web & Paternoster* (Palm. 71); *Winter v. Brockwell* (8 East. 308); *Taylor v. Waters* (7 Taunt. 374); *Hewlins v. Shipman* (5 B. & C 221); *Liggins v. Inge* (7 Bing. 682).

In *Shep. Touch.* 89, it is said, "When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass inclusive, together with the thing itself, without the words *cum pertinentiis*, or such like words. *Cuicunque aliquod conceditur etiam et id sine quo res ipsa non esse potuit.*"

By the grant of mills the waters, flood-gates, and the like, that are of necessary use to the mills, do pass.

In the *Duke of Devonshire v. Eglin* (14 Beav. 530) the defendant consented that the plaintiff and others might make a water-course through his land, on being paid a proper and reasonable sum. It was made, but no sum arranged, and no grant made. After some years use the defendant stopped it up. He was restrained from doing so,

and a reference made to settle the compensation. See *Cotching v. Bassett* (32 Beav. 101); *Dann v. Spurrier* (7 Ves. 213), where Lord Eldon says the court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title, and the circumstance of looking on is in many cases as strong as using terms of encouragement.

Wood v. Leadbitter does not overrule the cases of *Winters v. Brockwell*, and *Liggins v. Inge*, but it does decide that a parol license, for a consideration, to pass into, and through, and remain a certain time every day in a close, is revocable, and that such a right can only be created by deed.

See *Harvey v. Smith* (22 Beav. 299). The question was as to the right to use two chimney flues in the defendant's wall. The court restrained the defendant from stopping the flues, although no grant of the easement had been made. The consideration had been paid for it, and it had been used for eleven years. The court held that the agreement had been performed in every part except the conveyance, and would not allow Felton, the parol vendor of the easement, or any one claiming under him, to recall it, unless he made out that he was the purchaser for value without notice; and notice of the easement was held from the fact that on the top of the wall there were fourteen chimney pots, while the defendant had but twelve flues, and this ought to have put him on enquiry as to the other two, which were those used by the plaintiff.

I think this case falls within that class of cases, in which the easement is not referred to in the grant, but presumed by law to be included in it; or where the easement is substantially part of the thing granted, or especially necessary to its proper enjoyment—1 Wms. Saund. 323, note 6; *Shep. Touch.* 89; *Dand v. Kingscote* (6 M. & W. 174); *Pinnington v. Galland* (9 Ex. 10); *Pyer v. Carter* (1 H. & U. 916).

In *Phear on Rights of Water*, 73, it is laid down that, “whenever the owner of lands divides his property into two parts, granting away one of them, he is taken by implication

to include in his grant all such easements over the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. If the grantor has already treated this portion as separate property, the mode in which he enjoyed it, or allowed it to be enjoyed, affords a very proper indication of what rights over his remaining land he intended to pass as accessory to it."

By the conveyance to George Snure, as interpreted by the statute, Jacob conveyed to him the mills upon the land, together with the waters and water-courses, the easements to the land belonging, or with the same used, occupied and enjoyed. At the time this conveyance was made, water enough to propel the saw-mill and woollen factory had been used, occupied and enjoyed, and at the same time the grist-mill had been built, the machinery ready to be put in, the embankment of the pond tapped, and the embankment of the lower pond, intended exclusively for the use of the grist-mill, had been partly erected; all indicating that he himself intended to set in operation this mill, which was set in operation soon after, and has so continued since that time, and was in value equal to half the whole value of the mill property and privilege.

It is obvious that if these mills were sold they could be of no use without the right to maintain and use the waters upon the rest of the land of Jacob Snure, as an easement belonging to the land upon which the mills stood. The fair construction of the grant is, that with the land he impliedly granted the easement, without which the mills would have been of no comparative value.

In thus construing the grant, I make no distinction between the easement as regards the saw-mill and woollen factory which had been and were in operation, and the grist-mill which had not been finished or set in operation, for I think Jacob Snure could not be permitted to say to George, "True, when I sold the land I had built this mill and prepared everything for its working, but you shall not have the

water to propel it." In all fair dealing the grant of an easement, co-extensive with the requirement of this mill, was to be implied, as much as to the other mills.

Jacob Snure is not before us, and no adjudication here can bind his rights, but this whole litigation has arisen from want of skill and care in the conveyance from him to George Snure. From the discussion of the case we learn that the danger apprehended by the defendants arises from the peculiar circumstance, that the river Credit flows into the plaintiff's land from the west, then turns suddenly south-west back into Jacob Snure's land, then turns southerly and easterly back to the plaintiff's land again, so that Jacob is in a position to divert the water from the pond on the northeasterly part of the east half of 2 in the 4th concession to the lower bend of the river on this lot below the plaintiff's dam. But, if the true principle to the right to water in a river be, that he, through whose lands it flows, has a right to use it, so that he does not injure his neighbor by its use, I do not see by what right Jacob Snure could tap the embankment in his land above the plaintiff's dam, and divert the water to a place where it would again run into the river on his own land below the plaintiff's dam, thus preventing it from flowing through that reach of it which is in the plaintiff's land.

I have not thought it necessary to allude to the right of the plaintiff to enter upon the lands of Jacob Snure to maintain and repair the embankment there, for, as I think, the easement which the plaintiffs claim was impliely granted, and all the rights were granted necessary for its maintenance.

I think the judgment ought to be for the plaintiffs on all the issues.

RICHARDS, C. J., though absent, concurring with *A. Wilson, J.*, judgment was ordered to be entered accordingly.

RIDOUT V. HARRIS.

Conveyance of pews—Validity of deed, though grantee not described as member of Church of England—Evidence of membership—Secret trust in favor of parties ineligible to hold pews, does not vitiate deed at law—Church Temporalities Act—Ejectment does not lie for pews—Case proper remedy for disturbance of right thereto—Amendment.

Defendant, being the holder of certain pews situated in the gallery and aisles of the Church of St. James, in the city of Toronto, belonging to the Church of England, conveyed the same by deed to plaintiff, a member of that Church. It appeared that the deed, though made nominally to plaintiff, was in reality so made to him in trust for a corporation, to secure an advance of money by them to defendant, and, moreover, that several members of the corporation belonged to other religious denominations.

Plaintiff was not described in the deed as a member of the Church of England, but the evidence at the trial shewed that he had been in the habit of attending the services of that Church:

Held, that there was sufficient evidence that plaintiff belonged to the Church of England, and that it was not necessary that he should have been so described in the deed.

Held, also, that the deed, even if clothed with an unexpressed trust in favor of a corporation, incapacitated under the Church Temporalities Act from being pewholders, by reason of their not belonging to the Church of England, was nevertheless not void *in the eye of a court of law*, because it was apparently good on its face, and it was therefore binding between the parties to it.

Semble, that a court of equity would set aside the deed on account of the existence of such secret trust, but that a court of law could not recognize it, even if it were set out.

Held, also, that plaintiff could not maintain ejectment for the pews, because he was not entitled to the exclusive possession of them, his possession being limited to the special purpose of attending divine service, at which time alone he had the right to enter; and because such right was of an incorporeal nature, and possession of it could not be given by the sheriff.

CASE is the proper remedy for the disturbance of the right to occupy a pew.

Definition of the words "absolute purchase," contained in sec. 7 of the Church Temporalities Act.

The court *in banc*, after verdict and exception taken, amended the record in ejectment, by adding the words "lands and premises" to the property sued for.

Ejectment to recover certain pews, land and premises, situate in the church of St. James, in the city of Toronto, in the county of York, being pews Nos. 1, 16 and 20, in the east gallery of the church; Nos. 9, 10, 45 and 48, in the eastern aisle; No. 83 in the centre aisle; and Nos. 150, 173, 178 and 179, in the westerly aisle of the said church.

The defendant defended for the whole of the land therein mentioned.

The plaintiff claimed title by virtue of an indenture of bargain and sale from the defendant and Lucill Charles Harris, his wife [as to dower] to the plaintiff, bearing date the 29th of December, 1864.

The cause was tried at the last January assizes for York and Peel, before *Hagarty*, J., when a verdict was found for the plaintiff, with leave to the defendant to move to enter a nonsuit, if the court should be of opinion that he was entitled to it.

In Hilary term last, *K. McKenzie*, Q. C., accordingly moved for and obtained a rule *nisi*, calling on the plaintiff to shew cause why the verdict rendered should not be set aside and a nonsuit entered, on the following grounds:

1. That ejectment would not lie at common law, or under the statute, to recover the possession of the pews mentioned in the writ in this cause.

2. That the deed put in evidence at the trial was void for not shewing and stating in the deed that the plaintiff was a member of the Church of England, and that there was no legal evidence that the plaintiff was a member of the Church of England.

3. That the deed was void, the same having been taken as a security for money due to and for the use and benefit of the Canada Permanent Building and Savings Society, which society was composed of some persons who were not members of the Church of England; and that the deed had not been taken for the use of a member of the Church of England.

The rule was also to shew cause why the judgment should not be arrested, because ejectment would not lie for the recovery of *pews* in a church; but as an amendment was allowed by the court in term, by adding the words "lands and premises," this objection failed.

The defendant, however, was held entitled to have the benefit of the last ground stated in his rule in arrest of judgment, that there was no property described or mentioned in the writ [even as amended], for which ejectment would lie.

R. G. Dalton (*B. Jones* with him) shewed cause:—

Evidence was given that the plaintiff was and is a member of the Church of England quite sufficient, according to the *Yelverton* case, to justify a finding that he was a member of that church. It is true that the deed made to the plaintiff was made to him for the benefit of the Building Society, and it is true that among the members of that corporation are Jews and persons of many different Christian denominations; persons, in fact, who were not and are not members of the Church of England; but this is of no consequence, as the deed is absolute on its face to the plaintiff, his heirs and assigns, to and for his and their own use, and not in trust or for the benefit of any other person, or for any body whatever.

It is not necessary that the deed should have described the plaintiff to have been a member of the Church of England: if he were a member in fact, that is sufficient.

It may be admitted that ejectment will not lie in England for a church pew: *Rog. Eccl. Law*, 162 and following pages. The remedy there is for “Perturbation of Seat,” in the Ecclesiastical Court. In this province we have no such court, and the legislature must have intended, by the passing of the Church Temporalities Act, to have given a proper remedy in this province to the pewholder, who is disturbed in the possession of his pew. The statute meant to create a *corporeal*, and not a mere incorporeal right: *Brunskill v. Harris*, 1 Error and Appeal, 322.

Section 2 of the Act speaks of a *pew-holder holding* by purchase or lease, *holding sittings*, &c. Section 6 speaks also to the same effect. Now such rights must be conferred by deed: *Wood v. Leadbitter*, 13 M. & W. 838; *Taylor on Ev.* 838–9.

And such rights are more than a license, for they are not, as licenses are, revocable at the will of the grantor: the letting is to be subject to a rent, and a rent cannot issue from an incorporeal hereditament or property: *Gilbert on Rents*, 20–26; *Crabbe’s Real Property*, I. 82.

Section 7 is also important, for it shews the pews may be the subject of *absolute purchase*; and that “the same shall

be construed as a freehold of inheritance"; and that they "may be bargained, sold, and assigned to a purchaser." Now an *easement* is never bargained and sold: it properly lies *in grant*.

Section 8 provides, "that any pewholder, whether by purchase or lease, and any person renting a pew or sitting, shall and may during their rightful possession of such pew or sitting, have a right of action against any person injuring the same or disturbing him or his family in the possession thereof."

The statute throughout speaks of the *pew* being held, not merely the easement or right in it; and unless the purchaser or lessee be held to have the *property* itself of and in the pew, he cannot defend his possession as the statute allows him to do.

There may be a freehold or interest in part of a building, as in an upper chamber: *Shep. Touch.* 90, 94, 206; and in the case of mines: *Harris v. Ryding*, 5 M. & W. 60, 66, 71, 76.

The argument that the pewholder is not entitled to enter his pew, or even the church, at all times, is not conclusive against his having such an exclusive possession as to maintain trespass or ejectment for or in respect of his pew; for a lodger, having the exclusive possession of his room, might be rightly prevented from entering the house by the general owner of it, if he came at unreasonable hours, when the house was closed for the night.

McKenzie, Q. C., contra:—

Giving the fullest possible effect to the statute, it seems to be quite clear that an action of ejectment cannot be maintained for a church pew. When is the sheriff to deliver possession to the plaintiff? Can he insist upon getting into the church on any day? or is he to give possession on Sunday, when the church is open for divine service? or, while divine service is going on? But if possession should be delivered by the sheriff, the person receiving it could not retain it. He would not be entitled to stay there at all times; for he has the mere right to occupy the pew when the church is

opened for service, and at no other time, or for any other purpose. All this is quite inconsistent with the right being of such a nature as to be revocable by an ejectment. It is quite clear no precedent either in England or in this country can be produced for such an action. The case of *Brunskill v. Harris* was an action simply for the disturbance of the plaintiff in his pew, and it would seem that the judges, whose opinions have been printed, did not think the pewholder had such an interest in his pew as to maintain any kind of possessory action.

[He referred to a very great number of authorities, which need not be mentioned, as they will be found to be included in those which are contained in the judgment of the court]

The defendant is entitled, therefore, to have the judgment arrested on this ground, or to have a nonsuit entered. But the defendant is also entitled to have a nonsuit entered, because it was not shewn the plaintiff was a member of the Church of England; because he was not described as such in the deed to him; and because the conveyance was not to him in fact for his own use and benefit, but in trust for a corporation, which, it was admitted, did not consist wholly of those who were members of the Church of England.

A. WILSON, J. delivered the judgment of the court.

We think there was sufficient evidence that the plaintiff was a member of the Church of England, and that it is not necessary the plaintiff should have been described in the deed to have been such a member.

It is an important consideration whether the deed could have been rightly made to the plaintiff on behalf of any corporation, although the deed did not purport on its face to have been so made to him; and whether it could be made on behalf of a corporation consisting very largely of persons who were not members of the Church of England, a mere trading corporation, not for the purposes of actual user, but as a security for the payment of a debt.

In England a corporation may hold a pew: *Reg. v. The Mayor and Town Council of Warwick* (10 Jur. 962, S. C. 8

Q. B. 926); but in this case a pew was held for the purposes of actual user by the mayor and members of the corporation, who had long been in the habit of going in procession to church on Sunday. It was asked in argument by counsel—"Suppose the majority of the corporation were dissenters, would they have the power to vote a sum for the repair of a pew in a dissenting chapel?" No special answer was made to the question. Lord *Denman*, C. J., in giving judgment, said—"The decent repair of the pew is as proper as the repairs of the town hall: though it is not their property, the habit and practice of attending divine service in that pew will authorize the expenditure in question."

No doubt there are very many cases in England, and perhaps throughout the old country generally, where guilds and corporations have their public pews, and we can conceive no objection to their holding them for the actual use of their members, who may be members of the particular church where the pews are held.

We speak more particularly of pews in what is called in the old country the "Established Church;" for there may be special reasons there which are not at all applicable in this country, why pews should not be held by such bodies in what are there called *dissenting* churches or chapels.

At the times when these ancient pews were taken by such bodies, all of the members, under the stringent penalties for recusancy, were members of the Established Church; and in rather later times the corporation and test acts secured that necessary religious conformity in these bodies which it was thought was as indispensable for the due exercise of the corporate functions as it was salutary for the individual members who composed them. There could, therefore, be scarcely any objection to such a body being, both in its aggregate and constituent parts, a body of churchmen, holding the faculty of a pew for its general use. No doubt there are under the modern and the better legislation many persons in these corporations who are not members of the Church of England; but there can still be no serious diffi-

culty in this, when the faculties or other rights to pews, which, at the best, depend upon a rather precarious tenure, can be so easily recalled.

No one would be permitted, by the English law, to hold a faculty, license, or claim of any kind by way of a right to a pew, who was not a member of the church.

In this province, as the interests in such pews are transmissible without the consent of any of the church authorities, and are not revocable by them, the statute has wisely provided that, while the rights therein may be disposed of by the holder, they shall be disposed of to a person *being a member of the Church of England*. It would not have been seemly that such property should have been held by any persons but such as were members of the church; and however improbable it may have been supposed that such a case would ever arise, it was not altogether impossible; and one can conceive a purchase of pews by way of speculation being made by a person who was not a member of the church; but such a practice could not be allowed with safety to the church. The pewholders constitute the vestry, and have the principal management and control of the church; but if all these pewholders might be persons belonging to other denominations, it is not very difficult to see that the church itself could not be maintained as a body of christians belonging to the Church of England.

It is of necessity that members only should be pewholders; and it is of great consequence that the fullest effect should be given to the provisions of the statute in this particular.

It follows, therefore, that either the deed in question to the plaintiff must be void, because it was made to him on behalf of a corporate body of the nature and character mentioned, not members of the Church of England, or that the unexpressed but admitted trust for the corporation must be void, because contrary to the statute, and the plaintiff must hold the pew absolutely to and for his own personal use and benefit, discharged from every trust incompatible with the plain language of the deed.

We think this deed is not void, because it is apparently

good on its face, and it is binding between the parties to it, who are the parties to this suit.

If there be such a secret trust attached to the deed as has been mentioned, we suppose that that can be established in another court; and if the proper person be complainant, it is very likely that the deed might be set aside at his instance; but at law we cannot inquire into matters of that nature. We cannot establish such a trust for the purpose of defeating the deed. We can act upon no other declaration of trust than one which at law must be considered as a part, or a qualification, of the deed. No such declaration exists here. Equity can compel the discovery and declaration of such trusts by parol, which it holds to be equivalent, when proved, to written declarations, and which it applies in controlling or in creating such instruments.

The deed produced is valid on its face: we know nothing of trusts in an action of ejectment; and, perhaps, could not recognise them, even if they were set out as they are said to exist in this case. At law the trustee can turn his *cestui que trust* out of possession, and we could not prevent him; but in equity, where his rights are very differently regarded, we know that such a proceeding would not be allowed.

We think, therefore, we must here give effect to this deed as a conveyance transferring the rights of the defendant in these pews to the plaintiff.

The question then is, whether ejectment is maintainable for the pews which are sought to be recovered.

The pews are situated in a church of the Church of England, and come therefore within the provisions of the statute already referred to.

In determining whether ejectment can be brought for the pews, we are led necessarily to consider what the nature of the estate in those pews is under the statute.

If it be a mere incorporeal right, or even if it be a corporeal right, this action will fail; but if it be a corporeal interest or estate, and one to which the plaintiff, as owner

and purchaser, is exclusively entitled, the action may well be maintained.

The case of *Brunskill v. Harris*, which was cited on the argument, was one bearing very closely upon the question, but unfortunately it forms one of the cases which between

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have never been reported.

We have, however, after some enquiry, procured from the reporter at that time the draft judgments of the late Sir *James Macaulay*, and of Mr. Justice *Richards*, the present Chief Justice of this court. The late Judge *McLean*, then the third judge of this court, also pronounced a written judgment, but we have not been able to procure it.

That was an action on the case by a pewholder against the churchwardens, for disturbing the plaintiff in the possession of his pew in St. James' Church. The pleadings are stated at length in 1 Error and Appeal cases, 322.

Sir *James Macaulay*, C. J., in the court below, was of opinion the plaintiff's interest in the pew was of an incorporeal, and not of a corporeal, nature.

Richards, J., was of opinion it was not a corporeal right, assuming the plaintiff had a right at all, after the new church had been built on a different site from that on which the former building stood, nor an easement properly, but an incorporeal right.

The view which Mr. Justice *McLean* took upon this point I do not now remember; but I rather think he also thought the right claimed could not in any case be, and was not, more than an incorporeal one.

In the court above Mr. Justice *Burns* was, also, of the same opinion. *Esten*, V. C., assumes this to have been the extent of the right, and *Spragge*, V. C., appears to incline that way, though he does not express it.

The judgment of Sir *John B. Robinson*, having been unfortunately lost, is not published, and *Blake*, C., from the report, appears to have agreed with the majority.

The greater number of the judges, including those who were in favor of the plaintiff's right to recover, were there-

fore of the opinion the plaintiff had only an incorporeal interest in the church pew; and perhaps this was the opinion of the whole of the eight judges before whom the case was heard and by whom it was decided, but I cannot be quite sure as to this being so.

There seems to be no doubt that in England the pews in the Established Church, as part of the freehold, are vested in the incumbent for the use of the inhabitants of the parish; and although they may be granted to particular persons for their exclusive use, it is merely the right or easement to occupy the pews during divine service. The grantee acquires no property in them: it is said the law knows no such thing as such a kind of property: *Jarratt v. Steele* (3 Phill. 167; and that it is a wild conceit, that there can be such use made of pews as of villas, or other common property: 1 Hag. 321. And a pew so granted must be appurtenant to a house in the parish, and passes with the house when it is parted with, or to the new occupant of the house, or when the grantee ceases to be an inhabitant of the parish; for the seat doth not belong to the person, but to the inhabitant.

The grant of a pew in England to any person, without regard to a messuage or inhabitancy within the parish, is void by the general law; but it is said there may be a prescription by which a non-parishioner may have the right to be a pewholder; and it is said there may be a greater interest in a pew in the aisle and chancel than in the body of the church, in case the pewholder be the founder of the church, or he has been contributory to its building.

I do not think it is necessary to follow out the different results which the argument and the many cases we were referred to, and the many other cases to which we have ourselves referred, suggest: it is only necessary to consider whether there is any authority that either an action of trespass or an action of ejectment will lie for a church pew, either in the aisle or the nave of the church, and either in England or in this country.

In *Clifford v. Wicks* (1 B. & A. 498) it was held the

grant to one and his heirs by the lay impropriator, in whom the freehold is vested, was void, and trespass therefore did not lie.

In *Stocks v. Booth* (1 T. R. 430) *Buller*, J., said, "Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson. The word *possession* must always be understood *secundum subjectam materiam*."

In *Bryan v. Whistler* (8 B. & C. 288) trespass was held not to lie for disturbing the plaintiff's vault in a church. *Holroyd*, J., said, "If the plaintiff had the exclusive use of the vault for all purposes, trespass would lie; but he has only a special use, the right of burial there: case, therefore, was the proper remedy, as it is for the disturbance of a pew, the right to which is granted for the special purpose of attending divine service."

Then, in respect of the estate or interest of the plaintiff, will trespass or ejectment lie?

Ejectment will lie at common law only for corporeal hereditaments, or for property of which the sheriff can give possession, and into which an entry can be made; and therefore it is not maintainable for a rent, an advowson, or common in gross, or for anything which lies only in grant. Tithes, though an incorporeal hereditament, are recoverable by ejectment; but this is by the 32nd Hen. VIII. c. 7.

The interest and estate which a pewholder has in his pew was decided in *Brunskill v. Harris* to be of an incorporeal nature only. It appears to be the right to enter and occupy the pew during the celebration of divine service, not the right to be there at all times, or any other time than when the church is open for church purposes.

The words *absolute purchase* of any pew in the church, mentioned in the 7th section of the statute, do not mean that the purchaser is to hold free from all claim or control of the incumbent or churchwardens, or free from all interest of these persons in the general property of the church; but they are used in opposition to the rights of leaseholders of pews, and of those who have only sittings; and, subject to

the necessary incidents of such a species of property, a person may not improperly be said to be an *absolute purchaser* of, and to have a *freehold of inheritance* in, the pew which he has bought; for the right of freehold in a church only extends to the sitting therein: *Pawson v. Scott* (Say. 177); and possession, as has just been stated, must be taken to be at all times *secundum subjectam materiam*.

The estate or interest which the pewholder has is a tenement as much so as an advowson in gross: *Gully v. Bishop of Exeter* (4 Bing. 294); and it lies only in grant, and not in livery, because it is an incorporeal hereditament: Co. on Litt. 9th ed.

Because the plaintiff has not the exclusive possession of the pew, but has it only for a special and limited purpose, and only at special and limited times, and because the plaintiff's right is of an incorporeal nature, and possession of it could not be given by the sheriff, we think ejectment is not maintainable.

We may make mention of Burns' Eccl. Law, 9th ed., 1842, fos. 358, &c.; Rogers' Eccl. Law, fos. 163, &c.; Stephens' Laws of the Clergy, 1848, fo. 717; *Griffin v. Dightou* (10 Jur. N. S. 69, affirmed in Exch. Cham. 5 B. & S. 93); *Redhead v. Wait* (6 L. T. N. S. 480); *Harrison v. Forbes* (6 Jur. N. S. 1353); Crabbe's Law of Real Property, secs. 90, 481 to 497. See also very good dissertations on the subject in 8 Jur. N. S. part 2, fo. 439; 1 Law Mag., 574; 2 Law Mag. 1.

The rule will, therefore, be absolute that a verdict be entered for the defendant.

Rule absolute to enter verdict for defendant.

KINSEY V. NEWCOMBE.

Ejectment—Guardian and ward—Consol. Stat. U. C. ch. 74, s. 5.

Consol. Stat. U. C. ch. 74, s. 5, does not vest the real estate of an infant in the guardian, and such guardian cannot, therefore, bring ejectment in his own name: he must proceed, as guardian, in the name of the ward. *Doe Atkinson v. McLeod*, 8 U. C. R. 344, distinguished.

Ejectment for one acre, being part of lot 37 in the 11th concession of the township of Dumfries.

Nelson Newcombe died seised in fee of the land in question. He left ten children, eight by a former wife, and two by the defendant, who was his widow. One child was of age: seven by the former wife and two by the defendant were infants. All were living. The plaintiff was appointed guardian, under the statute, of the seven infants by the first marriage. The defendant, with her two children, retained possession of the land.

This action was brought by the plaintiff in his own name, claiming to be entitled to maintain it, as the guardian of the seven infants. In his notice of claim he claimed seven-tenths of the land as guardian of the seven infants, naming them. In her notice the defendant, besides denying the title of the plaintiff, asserted title in herself, as tenant to the heirs of Nelson Newcombe, who died intestate, seised of the premises.

The case was tried before the Chief Justice of this court, at Berlin, in the county of Waterloo.

The seisin of the intestate was proved, and the children he left. The appointment of the plaintiff as guardian to the seven children by the first marriage, the demand of possession of the defendant, and her answer, that she claimed the land till her youngest child became of age, were also proved.

Two amendments were prayed for at the trial; first, that the notice of the plaintiff's claim should have "as guardian to the seven children of, &c." naming them, inserted; and secondly, that instead of seven-tenths, seven undivided tenths should be inserted. The first amendment was refused, the second allowed.

Counsel for the defendant objected to the amendment, and that the plaintiff could not recover as guardian, he having no estate in the land, and that, as the action was brought by tenants in common, they should sue in their own name, to give the defendant, or the co-heirs, of whom she was the natural guardian, the benefit of the statute.

The learned Chief Justice directed the jury to find for the plaintiff, with leave to enter a nonsuit on these objections.

In Easter term *J. A. Boyd*, for defendant, obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved, on the grounds that the plaintiff had no legal estate in the lands in question to entitle him to maintain this action; and that, at all events, as he sued claiming to represent the estate of certain heirs at law, the suit should have been brought in the names of such heirs, to enable these co-heirs in possession and the defendant to set up a defence and admit the right of said heirs under the 29th and 30th sections of the ejectment act; and why the amendment made, by allowing the the plaintiff to claim seven undivided tenths of land herein, should not be set aside, as not warranted under the circumstances, and a nonsuit entered; or why, at all events, if the verdict were allowed to stand, the plaintiff should not be ordered to pay the costs of suit by the defendant.

During Trinity term *Ferguson* shewed cause, contending that on the authority of *Atkinson v McLeod*, 8 U. C. R. 344, the guardian could maintain this action; that neither the co-heirs nor the defendant could in any way be prejudiced in their defence, for the notice of title shewed that the plaintiff claimed the land as guardian of seven of the co-heirs, who were named in that notice; that the action was brought against the widow of Nelson Newcombe, not against the co-heirs, and she set up a claim as tenant to the heirs of Nelson Newcombe. He further contended that on the authority of *Ogilvy v. McRory*, 15 C. P. 557, the plaintiff was entitled to the amendment first asked for, as the written consent of the guardian was proved assenting to the amendment: *Hellyer v. King*, 6 Exch. 791. As to the other amendment, it was within the authority of the judge to make it: *Adams on Eject.* 18, 691.

There was nothing in that part of the rule asking costs, for the circumstances did not exist, to entitle the defendant to them.

Boyd, contra:—

A testamentary guardian has power to bring ejectment in

his own name under I. S. 12 Car. ii. c. 24, ss. 8, 9; but even under this statute he does not take any *estate* in the land: it is only an *incident* of the custody of the child: *Bedell v. Constable*, Vaughan 178: *Gardner v. Blane*, 1 Hare 382.

In *Cope v. Moony*, 14 Irish C. L. R. 256, the infant brought the action in his *own* name, by the guardian as his next friend, and the court leave undetermined whether or not the guardian should have been co-plaintiff.

It would seem that since the C. L. P. Act the party in whom is the *legal* estate should sue in ejectment: *Montgomery v. Montgomery*, 6 Ir. C. L. R. 522; *Stubber v. Roe*, 15 Irish C. L. R. 506: Cole on Ejectment, p. 75.

Before the C. L. P. Act, when the action was *fictitious*, the guardian was allowed to make a demise of the infants' lands, for the purpose of testing title: *Doe dem Atkinson v. McLeod*, 8 U. C. R. 344; but since the C. L. P. Act it would seem that the infants should at least be co-plaintiffs: *Ogilvy v. McRory*, 15 U. C. C. P. 557; or, perhaps, the infant should be the sole plaintiff, and sue by guardian as next friend: *Doe d. Marianne v. Alexander*, 1 U. C. R. 123.

But C. S. U. C. c. 27, s. 29, p. 307, must be also taken into account. It is open to the mother, as guardian in socage of children in possession, to raise this objection, as she defends in their right: *Doe d. Murphy v. McGuire*, 7 U. C. R. 309.

By the guardian suing in his own name the infant heirs in possession were prevented making application to defend by setting up *non-ouster*, as they could not swear they were co-heirs and co-possessors with the guardian: *Doe d. Wills v. Roe*, 4 Dowl. 628.

This affidavit is *essential*, and appearance without it would be a nullity: Cole on Ejectment, pp. 130, 131, and (Forms) p. 375.

Co-heirs are within the meaning of the above section: if not, then they are not within C. S. U. C. c. 88, s. 13, p. 872, and therefore the possession of one would be at common law the possession of all, so that the co-heirs out of posses-

sion cannot maintain ejectment without having *actual ouster*, which was not attempted in this case: *Colley v. Doe d. Taylerson*, 11 A. & E. p. 1014.

Again: If the mother had not defended, she would have been liable for the costs of the undefended action, in an action for mesne profits: *Adams*, p. 336; *Skene v. Skene*, 21 U. C. R. 454; *Lund v. Savage*, 12 U. C. C. P. 157.

Then, plaintiff should have claimed an *undivided* seven-tenths in the writ: *Cole*, p. 87. Under a demise of the whole, an undivided half may be recovered: *Doe d. Bryant v. Nipnel*, 1 Esp. 360. The rule is, that plaintiff is to recover *according to his title*, when he demands *more* than he has a title to, not *e contra*: *Dean ex d. Bruyere v. Purvis*, Burr, 327. He cannot recover premises of a description not mentioned in the declaration; *e. g.*, he cannot recover *arable* land when he describes it as pasture: *Lush's Prac.* 3rd Ed. 977. Now, by amendment at the trial the plaintiff was allowed to alter his title, he having before claimed in *severalty*, and thereby asserted right to dispossess defendant as to seven-tenths; but his right was, to be put into possession along with her and the co-heirs. But notice of *title* is not allowed to be amended at the trial: *Morgan v. Cook*, 18 U. C. R. 601-2; *Irwin v. Sayer*, 21 U. C. R. 383, per *Burns*, J. If, however, an amendment be allowed, the defendant should get costs of suit, under the rule in *Adams*, p. 180: see also when amendment was allowed in *Blake v. Done*, at *Nisi Prius*, as reported in 1 F. & F.

The Chief Justice of this court offered to allow plaintiff to amend at the trial, by making the infants, for whom he was guardian, co-plaintiffs; but this was declined. Had such offer and amendment been accepted and made, the petition and affidavits filed shew that the co-heirs in possession and the mother, who was defendant, were prepared to make application to defend, and to raise the issue of non-ouster, under the statute.

J. WILSON, J., delivered the judgment of the court.

By section 2 of the act respecting ejectment, "The writ

shall state the names of all the persons in whom the title is alleged to be, and shall command," &c.

By section 8 the persons named in the writ as defendants, or any of them, may appear within the time appointed, and with the appearance shall file a notice addressed to the claimant stating that, besides denying the title of the claimant, the party asserts title in himself, &c.

By section 21, "If no special case be agreed on the claimant may proceed to trial in the same manner as in other actions, and the particulars of the claim and defence and of the notices of claimant and defendant of their respective titles, if any, or copies thereof, shall be annexed to the record by the claimants, and, except in cases thereafter mentioned, the question at the trial shall be, whether the statement in the *writ of the title of the claimant* is true or false; and if true, then whether to the whole or part, and if to part, then to which part of the property in question."

Now by the writ, as set out in the record here, the plaintiff claims to be entitled to eject all other persons from the seven undivided tenths of the land therein mentioned.

The plaintiff moved to amend the record, which was amendable at the trial, by inserting the names of all the persons in whom the title was alleged to be; but, on objection made, he declined to amend, although he would have been allowed to do so, subject to the objection: *Ogilvy v. McRory* (15 C. P. 557). He relied on the authority of *Atkinson v. McLeod* (8 U. C. R. 344) as giving the plaintiff the right to maintain this action. Now, is the title in the plaintiff? According to his own contention it is not in him, except as the guardian of seven of the infant heirs of Nelson Newcombe; but that he is such guardian nowhere appears by the record. But by the notice of his claim, it does appear he claims title as guardian of these infants. We have his appointment in evidence, and it is made under the Consol. Stat. U. C. ch. 74. His authority is defined by the fifth section: "The guardian shall, during the continuance of his guardianship, have authority to act for and in behalf of his ward; and may appear in any court and prosecute or

defend any action in his or her name ; and shall have the charge and management of his or her estate, real and personal, and the care of his or her person and education."

There is nothing in this to vest the title in his or her real estate in the guardian, either directly or by implication. The title to the real estate remains in the ward, but the guardian may sue or defend in the name of the ward in any action.

Doe Atkinson v. McLeod was before the Ejectment Act, while yet the action of ejectment was a fiction ; and it was there held that the guardian might be the lessor of the plaintiff in that kind of fictitious action, for he might have the possession of his ward's estate to make a lease for the purposes of such an action ; but it was neither contended for nor held that the 8 Geo. IV. ch. 6 vested the title of the ward's estate in his guardian appointed under that act, which was consolidated by the 22 Vic. cap. 74.

It is to be regretted that the amendment was not made, for we think this action was misconceived and should have been brought in the names of the claimants, in whom the title was alleged to be, by the now plaintiff as their guardian. As we entertain this view of the case, the other points raised will not be material. The verdict will be set aside and a nonsuit entered pursuant to leave reserved.

Rule absolute to enter nonsuit.

ALLEN V. PARKE.

Executor of executor—Consol. Stats. U. C. ch. 16, s. 1.

Held, affirming the judgment of the county court, on demurrer to the replication set out below, that an executor of an executor represents the original testator, and is properly proceeded against on a claim against him. Under Consol. Stat. U. C. ch. 16, s. 1, the renunciation of probate by one of two or more executors is peremptory, and cannot be recalled on the death of the acting executor or executors.

This was an appeal from the decision of the judge of the county court of the county of Frontenac.

The plaintiff sued in the court below upon a writ requiring

the defendant to appear and shew cause why the plaintiff should not have execution against the defendant, as executor of the last will and testament of George Okill Stuart, deceased, of a judgment whereby the plaintiff, on the 26th of December, 1862, in the said county court, recovered against Thomas W. Robison, as executor of the last will and testament of the said the Rev. George Okill Stuart, \$257 65; and he alleged that Thomas W. Robison departed this life on the 6th of May, 1866, and by his last will and testament appointed the now defendant his sole executor, who had accepted the said executorship and the executorship of the said George Okill Stuart, and prayed that *execution* of the said judgment might be adjudged to him against the defendant.

The defendant pleaded that the very reverend George Okill Stuart by his last will and testament did appoint his son, George Okill Stuart, who still survived, and the said Thomas W. Robison, his executors.

The plaintiff replied that probate of the last will and testament of the very reverend George Okill Stewart was granted to Thomas W. Robison alone, the said other executor having previously renounced the executorship.

To this replication the defendant demurred, assigning for cause that the defendant could not become the executor of the said George Okill Stuart, deceased.

The learned judge of the court below, after hearing the parties on the demurrer, was of opinion that under the Consolidated Statutes for Upper Canada, ch. 16, s. 1, the renunciation of the co-executor of Thomas W. Robison made him as great a stranger to the will of the very reverend George Okill Stuart as any other person in no way named in or connected with the will, and he gave judgment accordingly for the plaintiff.

The grounds of appeal were covered by the last one stated, that although the defendant was executor of Thomas W. Robison, one of the executors of the very reverend George Okill Stuart, yet he was not thereby the executor of the said George Okill Stuart.

In Trinity term last, *P. McGregor*, for the defendant, the appellant:—

The defendant has no objection to act as executor under the will of the original testator, if he be the proper person in law to assume the office: he will act if it is determined he can act as such executor.

In the case, *In the goods of Badenach, deceased*, 10 Jur. N. S. 521, four executors had been named, probate was granted to one, reserving right to grant probate to two of the others, the fourth having renounced. Before renunciation, however, that executor had intermeddled in the estate. He applied afterwards for probate and to have the renunciation declared invalid. It was stated that under the old practice the course would have been to apply for leave to retract the renunciation, but by the Imperial Act 20 & 21 Vic. ch. 77, s. 79, an executor who has once renounced can no longer retract such renunciation, and therefore it was necessary the renunciation should be declared an invalid act. The judge ordinary thought there was nothing in the statute to prevent his allowing a retraction according to the old practice; that the renunciation was invalid, because the party having intermeddled could not renounce. He, therefore, vacated his renunciation, and allowed him to take probate. He referred also to Williams on Executors, 5 Ed. 262; 2 Bl. Com. 506.

S. Richards, Q. C., contra:—

Where there are two executors, and power has been reserved to one, who survives his co-executor, to come in and prove, if he do not appear to a citation, the grant will go as if his name had not appeared in the will, and the executors, if any, of the acting executor, will be the representatives of the original testator. *In the goods of Nodding*, 2 S. & T. 15, is in effect this case, excepting that the renunciation of the co-executor in this case more particularly cast the burden on Parke, as the executor of the acting executor of the original testator: *In re Lorimer*, 2 S. & T. 471. Parke, as proving Robison's will, became in law the executor of the Rev. G. O. Stuart: *Wankford v. Wankford*, 1 Salk. 299; Williams on Executors, 222-4.

A. WILSON, J., delivered the judgment of the court.

The statute referred to by the learned judge of the county court, which is an exact transcript of the Imperial Act before mentioned, is as follows :

“Where any person after the commencement of this act renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration to his effects shall and may without any further renunciation go, devolve and be committed, in like manner as if such person had not been appointed executor.”

The renunciation by the co-executor of Thos. W. Robison operated against him, therefore, “as if he had not been appointed executor,” in which case Thos. W. Robison remained, as a consequence, as if he alone had been appointed executor.

The pleadings shew that Robison proved the will of the original testator, and that Parke, the defendant, is Robison’s executor, and that he has accepted both the executorship of Robison and of the original testator. There is no longer room to doubt, in such a case, that Parke is in law the proper representative and executor of George Okill Stuart.

If Stuart’s will had not been proved, Parke, as Robison’s executor, could not have proved it, and therefore he could not have been the *executor* of Stuart’s will ; but it was duly proved, and there is no difficulty of that kind in the way of his acting.

The former rule, that one of two or more executors renouncing was nevertheless entitled, on the death of the executor who had proved, to retract his renunciation and to procure probate—*Rex v. Simpson* (3 Bur. 1463) ; *House v. Lord Petre* (1 Salk. 311)—is now by the new law entirely changed.

In Salk. 311 it is said : “But in another matter the common lawyers and the civilians disagreed. The common lawyers held, that where there are several executors, and one renounces before the ordinary, and the rest prove the

will, by the common law he who renounced may at any time afterwards come in and administer, and, though he never act during the life of his companions, may come in and take on him the execution of the will after their death, and shall be preferred before any executors of his companions; but the civilians held that by the civil law a renunciation is peremptory."

The object of the late legislation was to adopt the more reasonable rule of the civil lawyers, and to make the renunciation peremptory.

The appeal will be dismissed with costs.

Appeal dismissed, with costs.

McLELLAN V. McLELLAN.

Pro-note payable in Lower Canada—Non-presentment for nearly five years after maturity—Liability of maker—Waiver by endorser of presentment—Evidence.

The law of Lower Canada is the same as the law here, and the law of England, that, as between the holder and the endorser of a promissory note, the note must be presented for payment, so as to bind them, on the day the statute makes it payable, and at the place where it is payable; but, as between the holder and the maker, it is enough to present it at any time within the period fixed by the Statute of Limitations, and before action brought.

In this case, which was between holder and maker, the note was made in Upper Canada, payable at the Bank of Montreal, in Montreal, and was not presented until nearly five years after maturity, though before action brought:

Held, affirming the judgment of the County Court, that the note had been well presented.

Immediately before the note fell due the payee and first endorser wrote to plaintiff requesting him to waive protest, and agreeing to hold himself liable just as if the note had been presented for payment: *Held*, that though good as against the endorser, it was no evidence as against the maker, to preclude him from setting up that the note had not been presented for payment.

This was an appeal from the County Court of the united counties of Stormont, Dundas and Glengarry.

The promissory note, which was the cause of action, was made in Upper Canada, payable in Lower Canada, at the Bank of Montreal, in Montreal.

The plaintiff was endorsee, the defendant the maker of the note.

At the trial the learned judge in substance and in accordance with the law of Lower Canada, as proved at the trial, directed the jury that the plaintiff was entitled to recover, although the note had not been presented for payment at the Bank of Montreal till nearly five years after it became due,—that it was enough if it had been presented before the commencement of the suit; and he further directed the jury that they might assume that the note had been presented from the fact that just before it became due the payee and first endorser had written to the plaintiff requesting that protest of the note might be waived, he holding himself liable as if it had been presented for non-payment.

It was not pretended that the maker ever had funds at the bank to meet the note.

A new trial was moved for on grounds affecting the merits of this action, but disposed of, so that they did not come before the court, and as regarded these questions, the court below upheld its ruling and discharged the rule *nisi* for a new trial.

Against this judgment the defendant appealed, on the following grounds:

The plaintiff did not prove due presentment of the note for payment.

The note was payable at the Bank of Montreal, in Montreal, and was so declared upon, and due presentment there was averred and issue taken upon it, when in fact the plaintiff did not prove any presentment at the bank at the time it became due, and did not by his pleading or evidence excuse the non-presentment.

There was no evidence that by the law of Lower Canada it was due presentment of a note to present it for the first time some years after, or on any other day than that on which it was due and payable, and the only presentment shewn was a presentment some years after it became due.

It appeared, both by the statute law of Lower Canada and by an adjudicated case, reviewed by the judge as shewing

the law of Lower Canada, that the maker of a note payable at a particular place was not liable thereon, unless the note was duly presented at such place for payment when it became due.

The judge was mistaken in law, when he stated that from the fact of the endorser having on the day the note became due requested the holder not to protest the note, the jury had a right to infer that a presentment had been made.

S. Richards, Q. C., for the appeal, cited *O'Brien v. Stevenson*, 15 L. C. Rs. 265; Consol. Stats. L. C. ch. 64, sec. 9.

J. K. Kerr, contra, cited *Arnold v. Higgins*, 11 U. C. 446; Tay. Ev. secs. 12, 80, and cases; Storey Con. Laws, sec. 637; *Baron de Bode's* case, 8 Q. B. 208; *Rhodes v. Gent*, 5 B. & Al. 244; *Henry v. McDonell*, Rob. & H. Dig. 83; *Robinson v. Hawksford*, 9 Q. B. 52.

J. WILSON, J., delivered the judgment of the court.

By the civil code of Lower Canada, art. 2346, the provisions concerning bills of exchange contained in that title apply to promissory notes, when they relate, among other things, to "the time and place of payment," and to "presentment and payment." But, referring to the provisions spoken of in this article, we find in art. 2306, "Every bill of exchange must be presented by the holder, or on his behalf, to the drawee or acceptor, on the afternoon of the third day, after the day it becomes due," &c.; and by art. 2307, "If a bill of exchange be made payable at any stated place, either by its original tenor, or by a qualified acceptance, presentment must be made at such place." By article 2340, "In all matters relating to bills of exchange not provided for in this code, recourse must be had to the law of England in force on the thirtieth day of May, 1849."

At the trial *J. Houghton*, Esquire, an advocate of the bar of Lower Canada, proved that no presentment was necessary by the law of Lower Canada to bind the maker, when payable at a particular place. He referred to *Mount v. Dunn*, in L. C. R. We understand him to mean, that no present-

ment on the very day the note was payable was necessary to bind the maker, and this was the sense in which the judge of the county court understood him.

Now, the civil code and this evidence agree with our law. If a note is payable at a particular place, it is the duty of the maker to have the money there to answer it, and the holder must make the demand there before he can bring an action against the maker of a note. The risk, if the money is lost, will fall upon the holder of the note, if he fails to present it at maturity. *Rhodes v. Gent* (5 B. & Al. 244) is a leading case on this point. *Robinson v. Hawksford* (9 Ad. & El. s. 52) was an action on a check. There it was contended that unless the check was presented immediately, the drawer might stop its payment; but the court held that the drawer was bound to have the money at the bank to meet it; and *Patteson* said that if no inconvenience had been sustained, he should even say at any time within six years. The principle in these cases is, that if a note or check be made payable at a bank, the maker of the note and the drawer of the check are assumed to have money there to meet them at the day, and to have it there at the risk of the holder of the note or check in case of failure or accident on the part of the bank. * * The court is to be informed of foreign law by some one acquainted with it. What is proof of it is laid down in *Vander Douckt v. Thellusson* (8 C. B. 812). Here Mr. *Houghton* of the Lower Canada bar informs the court that a note made as the one before us does not require to be presented, and he referred to *Mount* and *Dunn* as deciding that point. But in the argument we were referred to the case of *O'Brien v. Stevenson* (15 L. C. R. 165) as the law of Lower Canada on this point. As we read it, it does not touch the case before us. It was an appeal from a judgment of the circuit court for the district of Arthabaska. The action was brought by the endorsees against the maker for the balance due on a promissory note for \$256.14, payable at the Bank of Montreal, in Montreal. The court below rendered judgment for the plaintiffs. *O'Brien*, one of the defendants, appealed, the principal ground of appeal being

that it did not appear by the declaration and the promissory note that the plaintiffs were entitled to recover, they having failed to prove the material allegations, &c.; and more especially because they did not prove that any demand had been made at the Bank of Montreal, in Montreal, where it was payable.

The court, in *Mount and Dunn* (4 L. C. R. 348) held that a note payable at a certain place was a note payable generally, and that it was not necessary to prove a demand at that particular place at maturity.

The court, in *O'Brien v. Stevenson*, say that that judgment was upon a note before the passing of the provincial statute (12 Vic. ch. 22), and if the present action were founded on such a note they would feel no difficulty in acting on the rule laid down there; but they thought the statute made a change in the law, by declaring that the maker of a note payable at a bank should not be liable to pay the note except in default of payment, when such payment is duly demanded at such bank.

It is said by the court: "In the present case there has been no such default in payment, because there has been no demand at the bank mentioned in the note as the place of payment, and therefore that the action of the plaintiff ought not to have been maintained."

The plaintiffs contended that under the circumstances as the pleadings stood, they were not bound to prove the allegation of a demand which they had not made, and that as they failed, their action ought to have been dismissed in the court below.

The court, considering that it was not proved that it had been demanded when it became due at the Bank of Montreal, where it was made payable, and considering that it had not been proved, as alleged, that at the time the note became due there were no funds belonging to the maker of the note at the Bank of Montreal, &c., the judgment in the court below was reversed.

In the case now before us a demand was proved, and the

answer was "no funds," and the evidence did not shew that there ever had been funds there to meet the note.

The law of England, as it was in 1849, is the law of Lower Canada, unless altered since that time; but we have just seen the alteration and the decision upon it, and it does not alter the law as now administered here and in England.

If a note be made payable at a particular place, the presentment at some time may be essential. The maker is not discharged by any delay short of the period fixed by the Statute of Limitations: *Anderson v. Cleveland* (note *b*, 13 East 430); *Halstead v. Skelton* (5 Q. B. 86); Byles on Bills, 199; Chitty on Bills, 10th ed. 244, 250.

But, it is said, the learned judge misdirected the jury as to the effect of the waiver of protest by the payee and first endorser of the note, holding it as evidence of presentment as against the maker. The learned judge seems to have overlooked the fact, that, as against the endorser, it was evidence to preclude him from setting up what he had waived, but the maker was a stranger to that admission, and it could in no way be evidence against him. But in the view we have expressed of the case this becomes unimportant; for, we think, the law of Lower Canada is in accordance with our law and the law of England, that, as between the holder and the endorsers, so as to bind them, the note must be presented for payment on the day the statute makes it payable, and at the place where it is payable; but, as between the maker and the holder, it is enough to present it at any time within the limit of the Statute of Limitations, and before the action is brought.

The appeal will be dismissed with costs.

Appeal dismissed, with costs.

MILLIGAN V. GRAND TRUNK RAILWAY CO.

Loss of goods by fire—Special conditions—Non-delivery of entire consignment—Acceptance of mixed goods—Estoppel—Conversion—Evidence—Proper direction to jury—New trial.

The first count of the declaration stated that defendants agreed to carry 3244 pounds of Canadian wool from T. to P. by rail, and thence to B. by steamboat or rail, and deliver there to plaintiff, certain perils and casualties excepted: *breach*, they did not deliver. 2nd count, same as first, but alleging they were to carry and deliver within reasonable time: *breach*, they did not carry within reasonable time, whereby the plaintiff was put to expense for want of the wool, and by reason of the delay was obliged to sell at less price, &c. 3rd count, that defendants agreed properly to stow and safely carry and deliver the wool, certain casualties, &c.: *breach*, the defendants so negligently conducted themselves that by reason thereof, and not of any excepted perils or casualties, the goods were greatly damaged. 4th count, trover for the goods.

Defendants pleaded (1) to the first three counts, that they did not promise, and to the 4th count not guilty. (2) To the 1st, 2nd and 4th counts, that the goods were delivered to and received by defendants upon the conditions that defendants should not be liable for damages arising from delays from storms, accidents, unavoidable causes, or from damage from the weather, fire, &c. The plea further averred that these conditions were contained in the written request made by plaintiff to defendants to receive and convey, and defendants received them on these conditions, and gave plaintiff a receipt for the goods containing these conditions; that the goods in course of carriage caught fire, and were damaged and destroyed; that the fire was accidental, and therefore defendants were prevented from delivering the goods. (3) To first three counts, a denial of receipt of the goods on the terms and conditions mentioned. (4) To 3rd count, that they used proper care in the carriage and stowage of the goods.

The evidence was, that on 6th September, 1864, plaintiff delivered to defendants thirteen sacks of wool, weighing 3244 pounds, addressed to the consignees in B., to be sent subject to defendants' tariff and to the conditions contained in the plaintiff's written request to defendants to receive same, defendants giving a receipt with similar conditions thereon. This wool was put into a car with wool from Michigan, consigned to one R., together with certain dutiable goods, and all arrived at Island Pond on 18th September following, where they were detained by the customs authorities. The car subsequently took fire, and the sacks containing the wool were burnt. Some of the wool was also burnt and some of it singed. In endeavoring to save it the wool became mixed and was carried in this state to P., where new sacks were obtained and the wool conveyed in them to B., and the thirteen sacks delivered to the consignees on 22nd October, but containing only 2498 pounds, instead of 3240, which the bill of lading shewed. On the delivery of four additional sacks, the weight being still short by twenty-nine pounds, an examination of the wool was made, when it was found to consist of 873 pounds of Canada fleece, 1160 scorched Canada, and 1168 pounds American fleece damaged by fire. This was sold on plaintiff's account, but did not realize as much, it was proved, as it would have brought had it arrived about a month earlier. It further appeared that 962 pounds Canada fleece had been delivered to R.

The judge charged the jury that defendants were not liable for the damage by fire; or for the delay at Island Pond, as they had not contracted to

guard against this; that plaintiff was entitled to such damages as arose from defendants' neglect in delivering mixed instead of all Canadian fleece, and for the amount of short weight.

The jury gave plaintiff \$300 damages.

Held, that the 1st and 2nd counts not embodying the exceptions contained in the contract, were not proved on the trial; that the 3rd count was not sustained by the evidence, and that to enable plaintiff to succeed he ought to amend.

Held, also, that plaintiff could not recover for the short weight, the evidence shewing a loss by fire of a considerable portion of the wool, and of the sacks, which would cause a diminution in the weight.

Held, also, that plaintiff was not estopped by the taking of the American wool from shewing a conversion by defendants of the Canadian wool; but that had defendants pleaded that he took the latter in lieu of the former, or of so much thereof as was deficient, there was evidence to go to the jury to warrant a verdict for defendants to a certain extent, if not for all that really ought to have been delivered.

Held, therefore, that there ought to be a new trial, costs to abide the event; and that the proper direction to the jury would be, that defendants were not liable for the delay, or for the loss by fire; that they were liable for the wool belonging to plaintiff, which they carried to B. and did not deliver; but that if plaintiff, with the knowledge of all the circumstances the evidence disclosed, took the one kind for the other and sold it, when he might have had his own, and the damaged Canadian wool was delivered to the consignee of the American wool with plaintiff's consent, in consideration of his getting the American in lieu of it, then plaintiff could not claim substantial damages either for breach of contract or for the wrongful conversion.

This case was tried before *Morrison*, J., at the last winter assizes for York and Peel.

The declaration contained four counts. The first charged that the defendants were carriers, and had agreed to carry 3244 pounds of Canada wool from Toronto to Portland by rail, and thence by steamboat or railway to Boston, and deliver it there to plaintiff, certain perils and casualties excepted: *breach*, that they did not deliver.

The second count was the same as the first, but alleged that the defendants were to carry and deliver within a reasonable time: *breach*, that they did not carry within a reasonable time, whereby plaintiff was put to expense for want of the wool, and by reason of the delay was obliged to sell at a less price, and was put to expense in looking after it.

The third count charged that the defendants agreed properly to stow and safely and securely carry and deliver the wool, certain casualties and perils only excepted: *breach*, that the defendants so negligently conducted themselves, that by reason thereof, and not by reason of any of the ex-

cepted perils and casualties, the goods were greatly damaged..

The fourth count was trover for the same goods, the wool.

The defendants pleaded to the first three counts, that they did not promise, and to the fourth count, not guilty.

To the first, second and fourth counts they pleaded, that the goods in all these counts were one and the same goods; that they were delivered to and received by the defendants upon condition that the defendants should not be liable for damages occasioned by delays from storms, accidents, from unavoidable causes, or from damage from the weather, fire, heat, frost, or delay of perishable articles, or from civil commotions; that the conditions were contained in and endorsed on the written request made by the plaintiff to defendants to receive and convey the goods, as in these counts mentioned; and that the defendants, at the request of the plaintiff, on the said conditions received the goods and gave the plaintiff a receipt for the same, the terms and conditions of which were contained in the said receipt and endorsed thereon, and were in all respects identical with the conditions on which the plaintiff requested the defendants to receive the goods; that is to say, that the defendants should not be liable for any damage to the goods by delays from storms, accidents, or unavoidable causes, or from damage from the weather, fire, heat, frost, or delay of perishable articles, or from civil commotion; that upon these terms and conditions, and no other, the goods were received by the defendants; that the goods, while being conveyed in the usual course of the defendants' business, caught fire and were damaged and destroyed, and that the fire was accidental, and by this accident the defendants were prevented from delivering the said goods in the said three counts mentioned.

For a second plea to the third count the defendants set out the delivery and receipt of the goods on the same conditions, and pleaded the same cause for the non-delivery of the goods. For a third plea to the first three counts, the defendants denied the receipt of the goods from the plaintiff on the terms and conditions mentioned in these three counts;

and for a fourth plea to the third count, the defendants said they did use due and proper care in the carriage and stowage of the goods.

The plaintiff took issue on all these pleas.

The evidence in substance was, that on the 6th of September, 1864, the plaintiff delivered to the defendants thirteen sacks of wool weighing 3244 pounds, in apparent good order, addressed to Archibald Milligan, Boston, to be sent subject to the tariff of defendants, and under the conditions stated on the other side of the paper which the plaintiff signed, requesting the defendants to receive the goods. The defendants gave a receipt to plaintiff for the wool, subject to the same conditions, among which were the conditions mentioned in the defendants' pleas.

On the 18th September a car containing this wool and wool from Michigan consigned to one Riley, together with goods subject to customs, arrived at Island Pond, and were there detained by the customs authorities of the United States until certain entries were made respecting the other goods. On the 3rd of October the car was found on fire. The sacks were burnt which contained the wool, some of which was also burnt and some singed. To save it, it was pulled out by grapples and became mixed. The Michigan wool was short and fine, the Canadian wool long and coarser. The whole that was saved was carried in bulk to Portland, where new sacks were procured and the wool put into them, and thence conveyed by steamboat to Boston. Here the thirteen sacks which had been consigned by the plaintiff to George W. Bond & Co., wool brokers, who had for some time been expecting its arrival, were delivered to them. They were to receive it and sell it for the plaintiff. By the usual course it should have arrived about the 20th of September at Boston, but it arrived there on the 22nd October, 1864. They received thirteen bags containing 2498 pounds, but the bill of lading specified 3240 pounds. At first the agents of the boat there declined to deliver more than thirteen sacks, but, on the amount in weight being demanded, they delivered four sacks more, weighing 713 pounds. These

were delivered on the 27th October, being still short in weight twenty-nine pounds, according to the boat's bill of lading, which was four pounds less than the defendants' bill. The number of sacks and weight not agreeing led to an examination of the wool, and the result was that there were found 873 pounds of sound Canada fleece wool, somewhat broken, 1160 pounds of scorched Canada fleece, damaged by fire, and 1168 pounds of American fleece wool, stained and also similarly damaged. The seventeen sacks weighed sixty pounds, making the gross weight 3211 pounds. This was sold for \$1138 15 in gold; but if it had come in time and been as described, and the exchange continued as it was about the 23rd September, it would have brought, in the estimation of Mr. Bond, \$457 20 more than he got for it, and this sum the plaintiff claimed.

In explanation of the different kinds of wool being delivered, Mr. Bond said he had seen in the hands of Mr. Riley a bill of lading dated at Flint, in Michigan, the 24th August, 1864, for 2234 pounds of Michigan wool, and he saw the wool which had been delivered by the defendants upon that bill. It consisted of 650 pounds American fleece, 962 pounds Canada fleece, and 550 pounds so burnt that he could not tell what kind it was, and this lot of wool was the only wool in the cars with plaintiff's. The four sacks of wool delivered to Messrs. Bond, on their demand for the plaintiff's wool by weight, came in bags belonging to, or marked with the name or initials of George W. Riley, and was claimed by him. It had been damaged by fire and water.

The plaintiff gave general evidence that he dealt only in Canadian wool, to rebut the presumption that he had sent American wool, which was of less value than Canadian in Boston at that time.

The learned judge reported that, at the close of the plaintiff's case, counsel for the defendants submitted that the plaintiff had made out no case, as it appeared in evidence that the wool was damaged by fire, and that under the conditions endorsed on the receipt the defendants were not liable for such damage.

2. That it was not shewn that the wool delivered to the defendants to carry was Canadian wool.

3. That the plaintiff was bound to produce the bill of lading mentioned in the evidence taken under the commission, as it was shewn to have been returned to him.

4. That the plaintiff's agent received from defendants' agent *the wool*, and the plaintiff was not now entitled to claim damages.

In reply it was contended, on behalf of the plaintiff, that from all that appeared the scorching and damage were the wilful act of the defendants, and not within the three conditions set out, and that the onus lay on the defendants to shew that it came within the conditions; that the wool might have been scorched after the 21st September at Boston, and that at all events it only applied to 873 pounds of the wool.

These objections were overruled.

The plaintiff put in the receipt given for the wool by the defendants, and the defendants put in the request of the plaintiff to receive and carry the wool. The conditions were alike and endorsed on both, and were the conditions mentioned in the pleas.

In leaving the case to the jury, the learned judge directed them that the defendants were not liable for the loss of the wool by fire; that as to the delay at Island Pond, the United States customs authorities had the power to detain the cars, and the onus of proof, that it arose from the negligence of the defendants in omitting to do something which would have avoided it, lay on the plaintiff; that it was a delay the plaintiff did not contract to guard against; that as to damages, the plaintiff was entitled to such as arose from the defendants' negligence in delivering mixed wool instead of Canadian fleece, *and for the quantity short in weight*.

It was objected, on the part of the defendants, that there was no evidence to go to the jury on the 2nd and 3rd counts, and so the judge thought; that as to the 1st count, for not delivering, the wool was delivered in part, and the learned judge was asked to direct the jury that the defendants were

not liable for non-delivery, as the plaintiff accepted the wool and sold it. The judge declined so to direct. It was further objected that under the 4th count there was no conversion; that defendants were not liable as common carriers, but only under their contract; and that plaintiff accepted the wool.

The jury found a verdict for the plaintiff and three hundred dollars damages.

In Hilary term last *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had between the parties, the verdict being contrary to law and evidence; and for misdirection of the learned judge; and for excessive damages; the misdirection consisting in telling the jury there was no evidence of the loss by fire of the plaintiff's wool, and that the plaintiff was entitled to recover for the difference between the value of American wool, though the plaintiff's agent received the wool from the defendants without objection, and used and disposed of the American wool; and the damages being excessive in this, that they were greater than the loss sustained by the plaintiff upon the evidence.

In the following Easter term *Robert A. Harrison* shewed cause, and urged that if the wool had been carried with care the fire would not have touched it; that it was delayed by having put with it in the car goods which were subject to customs dues, which wool was not; that the defendants were guilty of negligence and want of diligence, in not forwarding the wool, for it was evident that if the cars had not been detained, the fire could not have occurred. He cited *Robinson v. Shields*, 15 C. P. 386; *Moffatt v. Grand Trunk Railway Co.*, 15 C. P. 392; *Armstrong v. Twohy*, 15 C. P. 269.

M. C. Cameron, contra, contended that the evidence shewed there was no such contract made as that set out; that the judge misdirected the jury in telling them that the plaintiff was entitled to recover for the quantity short in

weight, for there was evidence of the loss of wool by the fire, for which the defendants were not liable; nor was the plaintiff entitled to the difference in value between the two, if he took the one for the other; that he had got his quantity, and he was afterwards precluded from saying that defendants converted his wool; but that if mixing the wool was a necessary consequence of the fire, the defendants were not liable for that consequence. He cited *Cornish v. Abington*, 4 H. & N. 549; *Pickard v. Sears*, 6 A. & E. 469; *Coles v. Bulman*, 6 C. B. 184; *Wilby v. West Cornwall Railway Co.*, 2 H. & N. 703; *Cronch v. Great Western Railway Co.*, 3 H. & N. 183.

J. WILSON, J., delivered the judgment of the court.

It was urged at the trial and on the argument, that if the defendants delivered as much wool to the plaintiff as they received and he took it, they had fulfilled their contract. The fallacy of this contention, as a legal proposition, will appear when stated in other terms: "That the plaintiff's wool, delivered in sacks to defendants in Toronto to be carried to Boston, needs not be delivered there in fulfilment of the contract to carry: it will be enough if the defendants deliver other wool in other sacks of the same weight; and, if his consignee received it, the plaintiff will be precluded from complaining that the wool was not his, but wool of a different kind and quality."

But suppose, as may probably have been the fact in this case, that the plaintiff's wool, in course of carriage, had been destroyed in part and damaged in part by fire, for which destruction and damage the defendants were not liable; suppose the defendants were ignorant of the different kinds of wool they were carrying, but were carrying in the same car different kinds of wool for two parties, which had caught fire, and in endeavoring to save it, it had become mixed; that the defendants, not distinguishing the one kind from the other, had delivered to the plaintiff as his wool that which belonged to the other party, and so *vice versâ*; suppose the plaintiff afterwards discovered his wool, which, with explanations

that were in his power to give, he could have got, by giving up the other's wool, but on examination he found there were but 962 pounds of his own, when he had 1168 pounds of the other, and on comparison of the profit and loss, it was more to his advantage to keep what he had got than give it back and claim his own;—could he set up a conversion of his wool, and would it not be a fair question for the jury to say, whether the plaintiff was entitled to damages, either for a breach of the contract to carry, or for a wrongful conversion of his goods? But the case was not presented in this aspect. The plaintiff contended that because the cars had been delayed the fire had occurred; that by the fire the wool was damaged, and the plaintiff was entitled to damages for both delay and loss, which he speculatively estimated at \$457.

The defendants contended that they were not liable for the delay, or for the loss, or consequences of the fire; and that the delivery of the Canadian and the Michigan wool was a complete fulfilment of their contract under the circumstances.

Assuming for a moment the pleadings had been framed to meet the case as we find it, the questions for the jury would have been, Was there a loss by fire? Did the plaintiff, when he made the demand for the wool which was deficient, demand Canadian wool, or wool only? Did he, when he knew all the circumstances, elect to keep what he had got rather than take the trouble to explain what was his, and return what he had got and get his own? and if yea, verdict for defendant.

We think, if the defendants had delivered all the plaintiff's wool which was saved from the fire, it was all they were bound to do; but that the delivery of a stranger's wool did not acquit them, unless by the consent of the plaintiff; but that if he was willing to take other wool than his own, he cannot afterwards complain of the substitution; but whether he did or not is a question for the jury.

The learned judge, in his charge to the jury, told them that as to the damage to the wool by the fire, the defendants

were not liable, or for the delay at Island Pond ; that as the contract was to carry from Toronto to Boston, the delay by the customs at Island Pond was a delay the defendants did not contract to guard against ; that as to damages, the plaintiff was entitled to such as arose from the defendants' neglect in delivering the mixed wool instead of all Canadian fleece, and for the amount of short weight.

The effect of the charge, as to the damages for not delivering the wool, may be put shortly thus : The defendants were not liable for what was destroyed or injured by the fire, but were liable for the difference in value between the wool that was delivered and such as *ought to have been delivered* under the contract. That, of course, would include deficiency in quantity as well as the delivery of such as was inferior in quality. But this charge, so put, also implies that what was destroyed of course ought not to be delivered at all, and what was injured, the defendants not being liable for the injury, was only to be estimated at its value as injured wool at the time it was delivered.

In this view we cannot say there was misdirection.

We think, however, the case has not been put before the jury so as to impress on their minds the real points to be decided by them under the facts proven. As the pleadings now stand, the rights of the parties, perhaps, in strictness cannot be as conveniently considered as if they were amended.

The first and second counts of the declaration, not embodying the exceptions contained in the contract, were not proven on the trial, and the evidence does not seem to sustain the third count. The fourth count, in trover, would be sustained to a certain extent, unless the jury should find that the plaintiff and his agent, as a matter of fact, authorized the delivery of the injured and other Canadian wool, that he did not receive, to the consignees of the Michigan wool, in consideration of the wool, not Canadian, which he did receive.

In this view, if the jury decided in favor of the defendants, they might have had a verdict on that count.

We have not been able to agree with the defendants'

counsel, that the taking of the Michigan wool estopped the plaintiff from shewing that they had converted his Canadian wool to their use. If the defendants had pleaded that he accepted the Michigan in lieu and stead of the Canadian wool, or of so much thereof as was deficient, we think there was evidence to go to the jury, if they gave effect to it, to warrant them in finding for the defendants to a certain extent, if not for all that really ought to have been delivered.

The first three counts of the declaration were not sustained by the evidence, and if the plaintiff wished to succeed on any of those counts he would be obliged to amend; but at the trial the defendants' counsel did not apparently object to the variance, but, being able to bring out the matter of the defence under the pleas, the substance of the defence was brought before the jury, when in strictness, as to these counts, framed as they were, the plaintiff ought not to have succeeded.

When the defendants wish to set up the weight of the Michigan wool in place of the Canadian, they are met with the objection that there is not any plea under which that defence can properly be set up. Yet the plaintiff did not feel warranted in claiming from the jury the whole value of the Canadian wool deficient, without allowing for the Michigan wool received by him.

We see there was evidence of loss by fire of a considerable portion of the plaintiff's wool; for the evidence is that the wool was scorched and damaged by fire, and the sacks were burnt which contained it, which could not be without diminution in weight. But for this loss in weight the defendants were not liable; and so, we think, there was not a proper finding as to this. The damages were, besides, excessive, and on this point the facts do not seem to have been sufficiently considered by the jury.

We think the proper direction will be, that defendants were not liable for the delay, or for the loss by fire; that they were liable for the wool of the plaintiff's which they carried to Boston and did not deliver; but that if the plaintiff, with knowledge of all the circumstances which the

evidence discloses, took the one kind of wool for the other, and kept and sold it when he might have had his own, then, with a proper plea on the part of the defendants, he is not entitled to claim substantial damages, either for breach of contract or for wrongful conversion.

If the damaged Canadian wool was delivered to the consignee of the Michigan wool with the consent of plaintiff, in consideration of his receiving the Michigan wool in lieu of it, then, as already mentioned, the jury would be warranted in finding there was no conversion.

When this case is considered, it will appear that the plaintiff got in money for this American wool as much, probably, as his own would have brought; for he had 1168 lbs. American for 962 lbs. of Canadian wool; and now that the rights of the parties are ascertained, it ought, we think, to be settled in accordance with them, unless indeed the parties are desirous of litigation for the sake of its enjoyment.

On the whole, we think there ought to be a new trial, costs to abide the event.

Rule absolute for new trial, costs to abide the event.

MCCURDY V. SWIFT, ADMINISTRATRIX.

Temperance Act of 1864, 27 & 28 Vic. c. 18, ss. 40, 41—By-law—Liability of innkeeper—Right to sue before prosecution for felony—Death of party assaulted—C. S. U. C. c. 78—Pleading.

Declaration, that defendant by his servant *wrongfully and in violation of the Temperance Act of 1864, in the township of A., then and there being fully in force*, furnished and gave one W. while in defendant's inn intoxicating liquors, whereby he became and was intoxicated, and while so intoxicated did assault the intestate, whereby he was immediately killed;

Held, on demurrer, that it was not necessary to allege a by-law of any municipal body as in operation in A. under the Temperance Act, but that the declaration could be sufficiently maintained under the 41st section of that act, under which the action was brought, as being one of the express provisions in force everywhere, irrespective of local prohibition, without holding that *fully* in force meant that the *full* Temperance Act was in force in A., which would have required a by-law to have been first passed for the purpose. But,

Held, that the declaration was defective, in not shewing that W. drank to *excess in the inn*, which was necessary to fix the innkeeper with liability under the 40th sec. of the act.

Held, also, (1) That the Temperance Act may be construed as giving the civil remedy, at any rate against the innkeeper, notwithstanding a felony may have been committed which has not been prosecuted for, although it does not, like the Imperial act, contain any express provision to that effect. (2.) That, as the legal representative is by sec. 41 expressly authorized to sue for an assault upon the deceased, the action may under the construction of the act be brought, though such assault has resulted in death. (3.) That this case was within the terms of C. S. C. ch. 78, the death of a person having been caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the injured party (by virtue of the Temperance Act) to maintain an action and recover damages in respect thereof; and that, therefore, defendant, who would have been liable by that act if death had not ensued, was still liable, notwithstanding the death of the person injured, and though caused under such circumstances as amounted to felony; and, therefore, the case being within that act,

Seemle, that the allegations in the declaration, that the intestate was killed within twelve months next before action brought, and that plaintiff sued as well for the benefit of herself, as the wife of deceased, as for that of their infant children, were necessary allegations.

The *declaration* stated that in the lifetime of Angus McCurdy, the deceased and intestate, the defendant was in the possession and occupation of a certain inn, tavern, or house of public entertainment, in the township of Ashfield, and while so using and occupying the same, which was under the charge of a servant of the defendant, the defendant, by his servant, wrongfully and in violation of the Temperance Act of 1864, in the township of Ashfield, then and there being fully in force, furnished and gave one William Wooley, while in the said inn, &c., intoxicating liquors, whereby Wooley became and was intoxicated, and while so intoxicated did assault, beat and ill-treat the said Angus McCurdy, whereby he was immediately killed, within twelve months next before the commencement of this suit; and the plaintiff, as administratrix, pursuant to the statute in that behalf, as well for the benefit of herself, as the wife of the said Angus McCurdy, as for the benefit of the three infant children [naming them] of the said Angus McCurdy, born of the body of the plaintiff, brought this action, and claimed \$5,000.

The defendant demurred to the declaration on the following grounds:—

1. No-by-law was shewn to have been passed, prohibiting the sale of intoxicating liquors in the township of Ashfield.

2. No facts were shewn from which it could be ascertained that the furnishing of intoxicating liquors to William Wooley was in violation of the Temperance Act of 1864.

3. The plaintiff could not, by the rules of pleading, allege generally that the furnishing of intoxicating liquors was in violation of the act, for it involved an allegation of law.

4. No proper issue in fact could be taken on such allegation.

5. There were various provisions of the act against furnishing liquor, and the particular facts relied upon should have been shewn, so that it might have been known whether the facts were within any of the provisions of the act.

6. No facts were shewn from which Wooley became or ever was liable to an action by the said Angus McCurdy for or in respect of the alleged assaulting, &c., and therefore defendant was not liable in this action.

7. McCurdy having been immediately killed, Wooley never was liable to McCurdy for the assault, &c.

8. It appeared a felony had been committed, and there could be no right of action by McCurdy against Wooley.

9. It was not shewn that Wooley had been acquitted or convicted of the felony, or of the assaulting, &c.

10. The statute did not apply when the party assaulted was killed by the assault.

11. It was not shewn the defendant's servant had any power, permission or authority from the defendant to furnish the liquor to the deceased.

In Easter term last, *S. Richards*, Q. C., for the demurrer:—

It was not stated, nor can it be inferred, that there was a sale of spirituous liquors by the defendant in violation of law. The exceptions in sec. 12 of the 28 Vic. ch. 18, the Temperance Act of 1864, should have been negatived.

(The Chief Justice referred to *Van Buren's* case, 9 Q. B. 669.)

The case appears to have been a felony on the part of Wooley, and therefore no action can be brought against him

until after he has been prosecuted for the felony, which has not been done: *Crosby v. Long*, 12 East. 409; Hales' P. C. 546; but even then this plaintiff could not sue Wooley: the action against him could only be brought by the deceased, if he had lived; and no action will lie against the defendant, unless Wooley could have been sued.

The remedy in this case, if there be any, should have been against the servant of the defendant: secs. 12-13-40-41-42 of the act.

J. Gwynne, Q. C., contra:—

A by-law did not require to be stated in this case: such a law is only required to give effect to merely local provisions. The declaration, therefore, is sufficient, in charging the sale of liquor to have been contrary to the Temperance Act. See sec. 16 of this act and the form in schedule C.

The plaintiff had a right of action against Wooley under the Act of Canada, Consol. Stats. ch. 78. The defendant is by the Temperance Act liable with Wooley, which makes him in effect liable in the same way and to the same extent as Wooley; and as Wooley is liable under ch. 78, so also is the defendant.

A. WILSON, J., delivered the judgment of the court.

The Temperance Act (in sec. 1) authorizes any municipal council "to pass a by-law prohibiting the sale of intoxicating liquors and the issue of licenses therefor." Sec. 12 provides that while the by-law "continues in force, no person, unless it be for exclusively medicinal or sacramental purposes, or for *bonâ fide* use in some art, trade or manufacture, or as hereinafter authorized by the third or fourth sub-sections of this section, shall within such county, &c., by himself, his clerk, servant or agent, expose or keep for sale, or directly or indirectly on any pretence, or by any device, sell or barter, or in consideration of the purchase of any other property, give to any other person any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous, or otherwise intoxicating." The third sub-section provides that

licensed distillers or brewers may expose at their distilleries or breweries, and keep for sale, such liquor as shall have been manufactured thereat and no other, and may sell thereat quantities not less than five gallons at a time, to be wholly removed and taken away in quantities not less than five gallons at a time; and licensed brewers may sell bottled ale or porter of such manufacture in quantities not less than one dozen bottles of at least three half pints each at a time, to be wholly removed and taken away in quantities not less than one dozen such bottles at a time. Sub-sec. 4 makes a somewhat similar provision in favor of merchants and traders.

From the 39th to the 46th clauses inclusively they are headed "General provisions, irrespective of local prohibition."

The 40th section is: "Whenever in any inn, * * * * wherein intoxicating liquor of any kind is sold, whether legally or illegally, any person has drunk to excess of intoxicating liquor of any kind therein furnished to him, and, while in a state of intoxication from such drinking, has come to his death by suicide or drowning, or perishing from cold or other accident caused by such intoxication, the keeper of such inn, * * * * and also any other person or persons who, for him or in his employ, delivered to such person the liquor whereby such intoxication was caused, shall be jointly and severally liable to an action as for personal wrong, if brought within three months thereafter, but not otherwise, by the legal representatives of the deceased person, and such representatives * * * * may recover such sum, not less than \$100 nor more than \$1000, in the aggregate of any such actions, as may therein be assessed by the court or jury as damages."

The 41st section is: "If a person in a state of intoxication assaults any person or injures any property, whoever furnished him with the liquor which occasioned his intoxication, if such furnishing was in violation of this act, or otherwise in violation of law, shall be jointly and severally liable to the same action by the party injured as the person intoxi-

cated may be liable to ; and such party injured, or his legal representatives, may bring either a joint and several action against the person intoxicated and the person or persons who furnished such liquor, or a separate action against any or either of them."

By the Consolidated Statutes of Canada, ch. 78, it is provided : "Whenever the death of a person has been caused by such wrongful act, neglect or default, as would [if death had not ensued] have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although his death has been caused under such circumstances as amount in law to a felony."

The action under this act must be brought by the personal representatives of the person injured in case of his death.

In the case of death by duelling, the person inflicting the wound or injury, and all others aiding or abetting the parties, as seconds or assistants, may be proceeded against, although no action for damages could have been brought by the person whose death may be so caused, had death not ensued.

The actions under the statute must be brought within twelve months after the death of the deceased person.

This declaration does not set out, or profess to set out, a by-law of any municipal body as in operation under the Temperance Act in the township of Ashfield : it alleges that the furnishing of the liquor was done. "wrongfully and in violation of the Temperance Act in the township of Ashfield, then and there being fully in force," which may be sufficiently maintained by the fact that the 41st sec., under which this action is brought, is one of a number of clauses which are by the express provisions of the act in force everywhere in the province, irrespective of local prohibition, without holding that *fully* in force means that the *full* Temperance Act was in force in the township ; which would have required a by-law to have been first passed for the purpose.

The 41st section gives a right of action, if the furnishing of the liquor was in violation of that act, or otherwise in violation of law; and under this the plaintiff may rely on the violation of the local prohibition or by-law, or on the violation of the enactments which have effect irrespective of local prohibition, or on the violation of the provisions of general law, if there be any such. We do not say there are, but we think this action is well brought under the second general class of cases.

The violation of the Temperance Act, shewn or professed to be shewn in this case, is a violation of the provisions of the 40th section. That section, as before stated, makes the offender liable "whenever *in any inn* * * * any person has *drunk to excess of intoxicating liquor*, of any kind, *therein furnished to him*, and *while in a state of intoxication from such drinking* has come to his death by suicide," &c.; and, it is said, it is a violation of the act to furnish a person in an inn, &c., with intoxicating liquor, who drinks to excess therein, and from such drinking becomes intoxicated, although such person does not come to his death thereby; and I think this is so: the innkeeper has done everything on his part to complete his part of the transaction: it then only depends on circumstances whether liability shall attach upon him for his past misconduct.

It is a wrongful act to make an excavation on one's own ground near to a common and public highway, and to leave it not properly protected to keep the public in passing along the highway from injury: *Barnes v. Ward* (9 C. B. 392); *Manley v. The St. Helen's Co.* (2 H. & N. 840). Perhaps for this alone an indictment would lie; but the same rule applies to a private way or path leading to one's house: *Chapman v. Rothwell* (El. Bl. & El. 168). So it is a wrongful act to drive horses, or to conduct a railway engine, unskilfully: *Vose v. The Lancashire Railway Co.* (2 H. & N. 728); but no action lies in any such case unless damage result from the act complained of.

It is the act or omission of the party that is wrongful, and is always so described, without regard to the results or

consequences which flow or may flow from it. These results or consequences may or may not end in a liability to suit : that depends upon whether damage or injury has ensued ; but although there can be no recovery and there is no damage in fact, there may nevertheless be the wrongful act ; for instance, in *Wylie v. Birch* (4 Q. B. 566) the plaintiff was held not to be entitled to recover for a false return to a *fi. fa.*, when it was shewn he had sustained no damage by it : *Williams v. Mastyn* (4 M. & W. 145) ; and in *Godefroy v. Jay* (7 Bing. 403) it is laid down that an attorney would not be liable for allowing a judgment by default to go against his client, if he could shew the client had sustained no damage thereby ; and in *Boulton v. Webster* (11 L. T. N. S. 598), where it was held that in a suit under Lord Campbell's act no action lies, if the damages be only nominal.

There are many cases in law where there is *damnum* without the *injuria*.

In the 4 Jac. 1, ch. 5, the vice is described as "the odious and loathsome sin of drunkenness," and the offender was punishable ; so the ale-house keeper was punishable for permitting tippling in his place : 1 Salk. 45.

In *Brandon v. Old* (3 C. & P. 440) *Best, C. J.*, said : "Drunkenness is forbidden by the common law ; but it has also been forbidden by statute from the reign of King Charles the Second down to the present time."

Our own municipal law confers power upon the councils to pass by-laws for preventing drunkenness, suppressing tippling houses, punishing persons found drunk in public places, and sending to the Houses of Industry and Refuge all such as spend their time and property in public houses, to the neglect of every lawful calling ; and they authorize very rigid terms being imposed upon all venders of spirituous liquors.

While the Temperance Statute is chiefly for the regulation of morals, I think it may well be said that there has been a violation of it by the acts above mentioned ; and perhaps it might not unsuccessfully be contended there had also been a violation of law generally.

Does this declaration, then, allege what the act declares shall be a violation of its provisions?

The declaration states that the defendant was in the possession and occupation of a certain inn, &c.; and while so using and occupying the said inn, &c., as a house of public entertainment, then being under the charge of his servant, by his servant "wrongfully and in violation of the Temperance Act of 1864, in the said township, furnished and gave one William Wooley, while *in the said inn, &c., intoxicating liquors*, whereby he became and was intoxicated, and while so intoxicated did assault, &c., the said Angus McCurdy, whereby," &c.

The statute requires that the party shall, 1st, have drunk *in the inn, &c.*; 2ndly, to *excess* of intoxicating liquor; 3rdly, *therein* furnished to him; and 4thly, that while in a state of intoxication from such drinking, the injurious act shall have happened.

The declaration says the defendant, by his servant, 1st, furnished and gave Wooley in the inn, &c., intoxicating liquors; 2ndly, whereby he became and was intoxicated; 3rdly, and while so intoxicated he did assault, &c.

The furnishing and giving to Wooley intoxicating liquors in the inn is not the same as Wooley having *drunk in the inn to excess of intoxicating liquors*. The declaration shews that the liquor was *therein* furnished, and I think it shews, also, under the statement, that while so intoxicated Wooley did the act when he was in a state of intoxication *from such drinking*.

But in consequence of the omission above mentioned, I think, the plaintiff has not shewn a state of intoxication in Wooley, brought about by a violation of the act in question; for it is quite plain that the act requires not only that the liquor shall be *furnished* in the inn, but that it shall be *drunk* in the inn, and drunk there *to excess*, to constitute responsibility in the innkeeper under the 40th section: it is the drinking to excess *in the inn* that is the culpable act of the innkeeper; an act which, it is presumed, he sees and knows of, and against which he may and ought to guard,

while he cannot prevent the excessive drinking beyond his own precincts; and, for anything that appears, Wooley may have been furnished in the inn with the liquor on one day, and have drank it to excess 50 miles off on another day, and there have become intoxicated, and then have assaulted McCurdy, for which it could not be reasonable to hold the defendant liable; or, for anything to the contrary, the defendant may have sold to Wooley five gallons of liquor at one time, who may have taken it wholly away to his own house and there have become intoxicated, for which the defendant would not have been answerable under the statute.

The words, that the defendant did what it is said he did wrongfully and in *violation* of the Temperance Act, means nothing without shewing how and in what manner it was wrongful and in violation of the act to do so.

The declaration, therefore, though not in the manner argued, we do not think contains a sufficient statement of facts, from which it may appear that cause of action has accrued against the defendant.

But it was argued that no action of the kind could be maintained, however the declaration was framed. It was contended that no action would lie by the representatives, unless an action would, also, have lain at the suit of the party injured against the person who did the injury; and that no such action would have lain in this case, first, because the assault and its consequences constituted a felony, and therefore no civil action was maintainable until after the public offence had been first prosecuted; and secondly, because, in consequence of death ensuing, the person intoxicated never became liable to a civil suit at the instance of the deceased.

Under the 40th section it is quite plain the civil action is maintainable against the innkeeper; but his act is not one of felony in any respect, nor a misdemeanor.

Under the 41st section it is very probable the legislature did not contemplate death resulting in such a manner as to amount to a felony.

The act, however, provides for the representatives of the

deceased suing; for provision has been made for this purpose. Now this is a new remedy against the innkeeper, and I do not think the legislature intended to postpone all redress against him until after a criminal prosecution had been had against the person intoxicated.

By ch. 78, before mentioned, and the corresponding act in England, the general rule and policy of the law in all cases within that statute have in this respect been altered.

So by the Carriers' Act (11 Geo. IV. and 1 Wm. IV. ch. 68) sec. 8, the plaintiff may reply that the carriers' servant feloniously broke the goods in respect of which the action is brought; which will, if shewn, entitle him to recover against the carrier, although the servant have not been prosecuted criminally.

The Temperance Act has not been so carefully framed as the Imperial Act alluded to, which expressly gives the civil remedy notwithstanding a felony has been committed which has not been prosecuted for; but I think the Temperance Act, at all events as against the innkeeper, may in like manner be acted on.

The remedy which has to be pursued in a case of the kind is said to be governed by the words, that the person who furnished the liquor "shall be jointly and severally liable to the same action by the party injured as the person intoxicated may be liable to." This probably means the same *kind* of action; and then, it is said, that only such an action as the person injured could have brought against the person intoxicated he may also bring against the innkeeper; and that although the representatives of the deceased may sue, yet they must bring one of the same kind of action the deceased could have brought if he had been living; and that they cannot sue for damages for the death of the deceased, because this is not the kind of action the deceased manifestly enough could have brought.

No doubt if the deceased had not been killed, or had not died, he must have sued the innkeeper in the like manner as he might have sued the person intoxicated, because the statute says they should be liable "to the same action," or,

as we read it, to the same form or kind of action, jointly and severally; and in such an action the person injured could have recovered to the full extent of the injury he had sustained, if that injury had been short of the total loss of life itself. In such an action there would have been a perfect measure of damage for the loss and injury actually sustained.

If the argument of the defendant prevail, there can be no such measure of damage when death is occasioned, and the action is brought by the representatives; because, if the same, or the same kind of action is to be brought by the representatives, and the same kind of action only which the deceased could have brought, the loss and injury which have been really sustained cannot be compensated: the damage felt is for the life taken, but the deceased if suing for his own personal injury must have claimed in a different manner and at a lower standard, yet at a perfectly definite scale; but what is the representative to state as the limit of his or her cause of action, or the extent of the damage, if it be not for what is actually the cause and occasion of the action and the amount of the loss?

The representative cannot stop short with the detail of an assault and beating, bruising and wounding, which confined the person assaulted to his bed for two or three weeks, when that beating, bruising and wounding led directly to the death of the person.

The person injured might have done so, for his statement would have been the fact and all the fact; but it is different with the representative, when the person assaulted has been killed. In such a case the representative must either tell the story as it is, or conjure up something which is not the true narrative. I do not know where the complaint is to end, if it is not to state the death which has happened.

I think it follows that, as the legal representative is expressly authorized to sue for an assault committed upon the deceased, he or she may do so, under the construction of this statute, although that assault has resulted in death. The 40th section gives the representative the right of action when

death has been occasioned by suicide, the 41st section, in this view, when life has been taken by another. The case, too, is, I think, brought within the terms of ch. 78 of the Consolidated Statutes for Canada; for in the words of that statute the death of a person has been caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the party injured [by virtue of the Temperance Act] to maintain an action and recover damages in respect thereof; and therefore the defendant, who would have been liable by the Temperance Act, if death had not ensued, is liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony.

I have had doubts—very great and frequent doubts—upon this subject, and I have felt and feel very strongly the enormous responsibility which is cast upon persons in the situation of this defendant; but I know of no other way of construing the provisions of the statute, which contains and was intended to contain provisions of the most stringent nature against persons who violated it.

The legislature must have considered, as many persons do, that the person who intoxicates, or suffers or encourages another to become intoxicated, when it is the interest of such person to make as large a sale of liquor as the other will or can be made to buy, is far more to blame than the unfortunate inebriate, and should therefore be answerable for the acts and conduct of the person who has been deprived of his senses and rendered a really dangerous being.

If there were fewer taverns and tippling houses there would be less intoxication, and it may not be unreasonable in some respects and to some extent to place the landlord and his guest on the same footing. A person, who makes and turns out a drunken man, may be thought to be quite as bad as the person who lets loose a dangerous animal, or exposes a dangerous substance or machine: *Scott v. Sheppard*, 2 W. Bl. 892, 3 Wils. 403.

I think, therefore, on the merits, that the action is maintainable, and I think this is so, although the only expression

in the statute on which this action is founded is the word *assault*.

An assault is described in Terms de la ley 56, to be a violent kind of injury offered to a man's person of a more large extent than battery, for it may be committed by offering a blow * * *

In *re Thompson* (6 H. & N. 198), *Pollock*, C. B., said: "An *assault* may be accompanied by violence from which death ensues, and then the offence would be either murder or manslaughter; or, the assault may be accompanied with the violation of the person of a woman against her will, in which case it would be rape; or, though the purpose was not effected, the circumstances might be such as to leave no doubt of an assault, with intent to commit a rape: therefore, an assault may amount to a capital felony, or a felony, or a misdemeanor, according to the circumstances with which it is accompanied."

The allegations that McCurdy was killed within twelve months next before the commencement of this suit, and that the plaintiff sues as well for the benefit of herself, as the wife of the deceased, as for the benefit of their three infant children, are perhaps necessary. I think the case, by the general language of the Temperance Act, is brought within the provisions of ch. 78 of the Consolidated Statutes for Canada.

For the defect of the declaration judgment will, however, be for the defendant on the demurrer.

Judgment for defendant on demurrer.

KOSTER V. HOLDEN.

Variance between declaration and agreement produced—Right to recover—Liquidated damages—Absence of plea of circuitry of action, effect of.

The declaration is set out in 16 C. P. 331.

The second count stated that the instalment of \$1000 was to be paid down for the purpose of satisfying thereout and discharging the said mortgages from the land: Held, that it was not necessary to prove this purpose, and that evidence of it offered at the trial, the terms not being contained in the agreement, did not make any alteration in the contract, and that the plaintiff should not, therefore, have been nonsuited.

Held, also, that inasmuch as the plaintiff was entitled to sue for the \$1000 independently of any act which he had to do in conveying or making a good title, and as nothing appeared in the pleadings to this count which shewed that there would be any circuity of action created by his recovering upon it, the plaintiff was entitled to the \$300, as liquidated damages.

The nonsuit was, therefore, set aside, the defendant being allowed to plead the defence of circuity of action.

The two special counts in this case are stated in 15 U. C. C. P. 331. Judgment was there given for the defendant, on the demurrer to the first count, and for the plaintiff on the second count. The third count was on the account stated.

Besides the demurrers the defendant pleaded to the first and second counts—

1. That he did not agree as alleged.
2. That he was always ready and willing and offered to perform the agreement on his part, but the plaintiff was not ready and willing to carry out the agreement on his part.
3. That the plaintiff had not at the time of the alleged breach, or at any time before the commencement of the suit, a good title to the land and premises, and was not able to convey the same according to the agreement.

And he pleaded to the third count—

4. Never indebted, and
5. Payment.

Upon these pleas issues in fact were joined.

The cause was tried at the last spring assizes for the united counties of York and Peel, before the Chief Justice of Upper Canada, when the plaintiff was nonsuited.

In Easter term last *Robert A. Harrison* obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside, and a new trial had between the parties, for misdirection of the learned Chief Justice, in holding that the memorandum in writing signed by the parties and proved at the trial must be taken as the entire contract between them, although it was proved not to contain the whole agreement; and in holding that to satisfy the fourth section of the Statute of Frauds the note or memorandum of agreement required to be in writing must contain all the terms of the agreement between the parties; and in

refusing to allow the plaintiff to prove the real agreement, because partly reduced to writing, which writing did not contain and was not intended to contain the whole agreement.

The evidence relating to the points mentioned in the rule was as follows :

Peter Koster said : " The plaintiff and defendant had a bargain on 30th May, 1865. Defendant asked the plaintiff if he would sell No. 26 in the 1st concession of Uxbridge. He went over the west 100 acres. Plaintiff was willing to sell the west half. The whole agreement was not put in writing. It was said there were two mortgages on the place, one to St. George and one to Leary. I drew up a writing. I saw defendant make his mark to it: he cannot write. There is nothing in the writing about the mortgages. The bargain was all complete before this writing was drawn. Nothing was agreed afterwards."

The defendant's counsel objected to this evidence. He contended that the memorandum or note must contain all the terms of the agreement, which could not be added to by parol.

The Chief Justice was of opinion that what the plaintiff proposed to add was a material part and that it could not be added by words, but must be part of the writing; upon which the plaintiff took a nonsuit.

In Trinity term last, *M. C. Cameron, Q. C.*, (*McMichael* with him) shewed cause:—

The plaintiff was not at liberty to prove that the \$1000 down were to be paid before the deed was made to enable the plaintiff to discharge the mortgages upon the land. The writing produced did not sustain the second count: the terms desired to be added by parol should have been in writing.

Lindley v. Lacey, 11 L. T. N. S. 578, does not support the plaintiff's view of the law: in equity even the written contract cannot be varied by parol: *Martin v. Pyecroft*, 2 DeG. M. & G. 785; *Croome v. Lediard*, 2 M. & K. 251. (They referred also to Taylor on Ev. 4 Ed. sec. 1036.)

Harrison, contra:—

The second count is substantially for the recovery of the \$1000, and the purpose for which it was required is of no consequence.

A party may shew the writing is not the whole of the contract: *Allen v Parke*, 4 M. & W. 140; *Harris v. Rickett*, 4 H. & N. 1; *Wake v. Harrop*, 6 H. & N. 775; *Rogers v Hadley*, 2 H. & C. 227; *Kempson v Boyle*, 3 H. & C. 763.

Any collateral term of the agreement need not be in writing: *Davies v. Jones*, 17 C. B. 625; *Wallace v. Leith*, 11 C. B. N. S. 369; *Lindley v. Lacey*, 17 C. B. N. S. 578.

There was misdirection in ruling that all the terms of the agreement should under the Statute of Frauds have been in writing: the statute only requires a memorandum or note of it should be in writing.

A. WILSON, J., delivered the judgment of the court.

The construction which we placed on the agreement was, that the \$1000, being payable down, were payable on the execution of the contract, or within a reasonable time afterwards, and were payable, therefore, before the defendant could call for a deed. The object of this was most likely to enable the plaintiff to pay off the encumbrances on the land, so as to give to the defendant a marketable title.

If this be the reading of the contract, and we think it is, it is of no moment what purpose the plaintiff wanted the \$1000 paid down for: he bargained for it and was entitled to have it.

I do not see; therefore, that the allegation in the second count, on the evidence offered at the trial, that the money was so reserved for the purpose of enabling the plaintiff to pay off the encumbrances on the land, either called upon the plaintiff to sustain that allegation by proof, or made that evidence contribute anything material to the terms of the agreement.

I do not feel quite satisfied that on the first issue, that is, whether the defendant did agree in the manner alleged,

there was any failure or insufficiency of proof by the plaintiff.

It is not necessary, then, to refer to the cases which were cited as to proving by parol part of the agreement which may not have been reduced to writing; for no material fact of it was, we think, omitted from the writing.

We think that after the 19th of September the plaintiff could not maintain an action for the \$1000, because he was then in default himself, and, if he had recovered these sums, or either of them, he could have been compelled to pay them back again.

I see no reason, however, why he could not have sued before the 19th of September to enforce payment of the \$1000, because it was payable to him before that day, and no defence could have been set up to such an action; nor do I see any reason why he could not, after the 19th of September, maintain an action for damages for the non-payment of the \$1000 at the specified time, provided these damages are not exactly covered by the counter-claim for damages which the defendant would be entitled to set up by way of answer, not as a set-off, but as an avoidance of circuity of action.

The damages which the plaintiff, the vendor, would be entitled to in such a case are said to be for "the injury he had sustained by reason of the defendant not having performed his contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract: it is clear he cannot have the land and its value too:" per *Parke*, B., in *Laird v. Pim*, 7 M. & W. 478.

It is likened to the case of a sale of goods, in which event the vendor, if the analogy hold good, is entitled to the difference between the price the goods were sold for to the defendant, and the price he has got for them upon a re-sale made by reason of the purchaser's default, or their market price at the time of such default: *Bowman v. Nash* (9 B. & C. 145); *Barrow v. Arnand* (8 Q. B. 609-610); and he would also have been entitled to the interest on any deposit

that was to have been made to him from the time it ought to have been paid to him until the period of default.

The damages the defendant would be entitled to would, as a general rule, be merely nominal.

The damages, therefore, not being necessarily of the same amount in each case, the doctrine of circuity of action could not be applied: *Charles v. Altin* (15 C. B. 46); *Minshull v. Oakes* (2 H. & N. 793); *Jackson v. Isaacs* (3 H. & N. 405); *Speeding v. Young* (16 C. B. N. S. 824); and the plaintiff could not be defeated of his action for damages, because of the defendant's cross-claim upon the same contract for damages also.

But in this case the question is, are not the damages alike for each party? Or, is not the sum of \$300 a fixed and liquidated amount?

This is a transaction, in which it has often been thought, that the vendee should recover more than nominal damages for the breach of contract by the vendor. He cannot recover for the loss of his bargain: *Flurenner v. Thornhill* (2 W. Bl. 1078); *Sikes v. Wild* (32 L. T. Q. B. 375, 4 B. & S. 421); nor for the loss of profit on a re-sale; nor the expenses of a re-sale; nor the expenses of the sub-purchasers in investigating the title, because the purchaser had been premature in all these respects and should have waited until his title was assured to him: *Walker v. Moore* (10 B. & C. 416); nor for raising money to pay the price with: *Hanslip v. Padwick* (5 Exch. 615); nor for a survey made or conveyance drawn, in anticipation of a good title being shewn: *Hodges v. Earl of Litchfield* (1 B. N. C. 492); nor for repairs or improvements made: *Worthington v. Warrington* (8 C. B. 134); but he can recover for investigating the title, searching for judgments and encumbrances, comparing the abstract, and for the expenses of entering into the agreement, and for interest on his deposit; and, therefore, when a vendee protects the bargain by a specific sum in case of breach by the vendor, there may be much reason for treating this as an amount inserted to cover just such items of expense as purchasers frequently, though not wisely,

incur in anticipation that everything will prove correct; and it would be hard if the seller in such a case could take the benefit of the repairs and improvements made by the purchaser, without making any allowance for them; or that the purchaser should lose by any change of investment, or sale of stock, or otherwise, in raising money to meet the purchase-money which he believed he would have to pay.

So the seller may in like manner in many ways be put to expense and inconvenience upon the faith of the sale being carried out, which he might not be able in law to recover; and therefore there are many reasons on each side why a specific sum should in many cases, in the event of default, be construed, because probably intended by the parties to have been considered, as liquidated damages, and not as a penalty.

The parties here have said, "And if any party would flunk out of the bargain and not do according to his agreement, that he must pay \$300 for damages to the other party, on the 19th of September, 1865."

This sum is not said to be a penalty, which, perhaps, is not of much weight; nor is it a larger sum than the amount it is intended to secure; nor is it a sum to secure several acts which in case of breach will in some instances be too large, and in others too small, a compensation for the injury.

In *Reynolds v. Bridge* (6 E. & B. 528) the defendant covenanted not to practice the business of a surgeon or apothecary, &c., in Wellington, or within twelve miles of it, under the liability of £2000, as liquidated damages, and not as a penalty; and that in case either party should make default in performance of any covenant, he should pay to the other £500, as and for liquidated damages, and not as penalty. The defendant committed a breach by practising contrary to the covenant: *Held*, the £2000 were recoverable as liquidated damages, no one of the provisions of the covenant to which it applied being such that the damage for the breach of it was capable of precise estimation.

Coleridge, J., said: "I think there is no great disagree-

ment among the authorities as to the instances in which the sum named is to be considered as constituting liquidated damages or a penalty: all that the courts have done is to lay down a course for establishing the intention of the parties: the mere magnitude of the sum does not prevent it from being liquidated damages. Another rule has been suggested, that where the sum to be paid is for the breach of an agreement containing more than one stipulation, it shall not be taken for liquidated damages. That is, certainly, found in some cases; but it cannot be said to be law now. * * * The principle seems to be, that if you find a covenant, the breach of which will occasion a damage not uncertain, but such as is capable of being ascertained; as, where there is a particular sum to be paid, which is much less than the sum named as payable upon the breach, there it is held the last named sum is specified by way of penalty, because a court of equity would limit the amount to be actually paid. Then comes the case where there are several provisions, the breach of some of which will produce an ascertainable damage, but the breach of others an uncertain damage: in that case, though we do not require to determine it now, inasmuch as there is one provision in respect of which the sum named cannot be taken as liquidated damages, it cannot be so taken for any provision; for if it could, the contract would mean liquidated damages in one case and not in another."

Erle, J., said: "From the nature of the contract, the damages for the breach of it are clearly undefined. It is impossible, on ascertaining the fact that any one or more breaches have been committed, to say with certainty what damages have resulted: they might be the loss of a fortune or only the loss of the amount of a particular bill: they are therefore undefined; and it is clear that in such case the covenantee is to have the £2000."

Crompton, J., said: "There are not distinct penalties for each breach, but by the agreement, if the covenant is once broken as to any provision which it contains, the whole is at an end: the liquidated sum is to be named, and there

can be no recovery in respect of anything which occurs afterwards.”—See particularly *Sainter v. Ferguson* (7 C. B. 716); *Atkyns v. Kinnier* (4 Exch. 776), and *Sparrow v. Paris* (7 H. & N. 594).

In the case before us there was only one act to be done; money to be paid on one side, and a conveyance to be made on the other. It could not be said with certainty when the contract was made, what damages would result by the breach of it on either side: they were, therefore, undefined. When the contract was once broken the whole of it was at an end, and nothing could be recovered for what happened afterwards; and there were not several provisions, some or one of which could be compensated for by the payment of an ascertained sum for damages. I come, therefore, to the conclusion, as this is a question of law and not of fact—*Sainter v. Ferguson* (7 C. B. 727), per *Wilde*, C. J.; *Reindel v. Schell* (4 C. B. N. S. 97); *Reynolds v. Bridge* (6 E. & B. 528)—that the sum of \$300 is an ascertained and liquidated sum, to be paid as damages upon a breach occurring, and not in the nature of a penalty reducible by the jury.

If it be a liquidated sum to the plaintiff, it must be so also to the defendant: if it was not, “the contract would mean liquidated damages in one case and not in another.”

On the demurrer the first count disclosed, as we thought, a state of facts as to the purchase money, which prevented the plaintiff from recovering, because the defendant would have been entitled to recover the like amount back again, if he had been directed to pay it.

We did not consider the case then as to the *damages*: if we had, the conclusion ought to have been the same as it was; for, as the damages are liquidated on each side, and there had been a breach on each side, the same amount which the plaintiff was demanding could have been demanded back again from him by the defendant.

If the damages had not been so ascertained, and so alike to each party, the conclusion at which we arrived would not have been correct.

As to the second count, I am not satisfied the plaintiff properly failed upon the first issue, as before mentioned.

Upon the second and third issues, I think, he did fail; for he was not ready and willing in the legal acceptance—*De Medina v. Norman* (9 M. & W. 827)—to make a conveyance.

If the plaintiff is entitled to a verdict on the first issue, he must be entitled to the \$300 damages as a consequence; because the defendant's breach by non-payment of the \$1000 is not at all affected by the plaintiff's subsequent inability to convey the land; and because there is no defence upon the record of circuitry of action, or otherwise, to prevent a recovery by the plaintiff.

The defendant is not obliged to plead such a defence, and he may prefer bringing a cross action for his redress, in place of barring the present one.

We presume that if the nonsuit be set aside, the defendant will most probably apply for leave to add such a plea, which we would have to allow. It is for the plaintiff to consider whether he should press his rule further in such a case: if he desire to carry the cause into appeal he may prefer having the rule discharged.

We shall, therefore, leave it to himself to elect having the rule made absolute, the defendant having leave to amend his pleading, if he wish it, as before mentioned, or having the rule discharged. If the defendant amend, he should pay costs; and if the rule be discharged, it should be without costs; for the former decision was a ground not relied upon, and of which the defendant has not in any way, as he might have done, availed himself before the present time.

The plaintiff's counsel electing to have the rule made absolute, the rule will be absolute accordingly.

Rule absolute to enter nonsuit.

MASON (OFFICIAL ASSIGNEE) V. BABINGTON (ADMINISTRATOR.)

Assets quando—Final judgment—Regularity and irregularity in writs against lands and goods—Suggestion without leave—Debt and damages—Practice.

The plaintiff, as official assignee, sued defendant, as administrator, on a promissory note payable to W. or bearer. Defendant pleaded *plene administravit præter* goods not sufficient to satisfy a judgment outstanding. Plaintiff replied, confessing the plea, and prayed judgment and his damages, &c., of assets *quando*. The pleadings were thus entered on the roll, together with a second prayer of judgment for plaintiff's debt, &c. Then followed the judgment as for damages, and a suggestion that intestate died seised of lands, &c., and a prayer that the amount recovered might be levied of the lands. A *fi. fa.* against goods issued on 19th February, as for damages recovered, which was returned no goods, and on the 20th February a *fi. fa.* lands issued, which spoke merely of the amount recovered. There had been no order of reference to the Master to ascertain the amount, nor any assessment by a jury, nor any *sci. fa.* to enquire as to goods:

Held, on application to set aside the judgments and writs, that the judgment was a final judgment, and that no reference or assessment was requisite.

Held, also, that the writ against goods on a judgment of assets *quando* was irregular, there having been no writ of *sci. fa.*, or revivor; but that notwithstanding the writ against lands was not irregular, as the record shewed there were no goods.

Held, also, that the proceedings on the suggestion were regular, without any leave to enter such suggestion or judgment thereon; and that the discrepancies between debt and damages were mere defects in form, and amendable.

Quære, whether any suggestion of lands at all was requisite?

In Easter term last *F. Osler* obtained a rule calling on the plaintiff to shew cause—

1. Why the judgment herein entered on 19th of February, 1866, and the writs of *fieri facias* against goods and against lands issued thereon should not be set aside with costs, for irregularity, on the following grounds:

Because the judgement was a final judgment in *assumpsit* and not in debt, and was not signed for default of plea, but after the filing and service of an admission of the defendant's plea and of a prayer of judgment for the plaintiff's damages; yet there was no order referring it to the Master to ascertain the amount of damages to which the plaintiff was entitled and for which the judgment was to be signed, nor were such damages assessed by a jury or ordered to be calculated by the Master; and it did not appear from the judgment, or from any papers or proceedings filed in this

suit, how or by what authority the damages were ascertained, or judgment signed.

2. Why the *fieri facias* against goods and the sheriff's return thereto should not be set aside and quashed on the further ground, that the said writ was issued on a judgment of assets *quando acciderint* before any writ of revivor or *scire facias* had been issued on the judgment, and because the said writ did not follow the judgment.

3. Why the writ of *fieri facias* against lands of the intestate, Eli Gorham Irwin, deceased, in the hands of the sheriff of the united counties of York and Peel, should not be set aside on the further grounds, that no proper writ of *fieri facias* against goods was ever issued or returned herein to ground such *fi. fa.* against lands, and that the writ against lands did not follow the judgment on which it purported to be issued.

4. There was no award of judgment or execution on the roll of judgment, which warranted the writ of *fieri facias* against lands until the return of an execution regularly issued against goods, and that there was no award of judgment on the suggestion entered on the roll.

5. Why the said suggestion and all subsequent proceedings had thereon should not be set aside, as aforesaid, on the ground that the said suggestion was entered on the roll without the leave of the court or a judge, and that there was no award of judgment thereon.

In Trinity term last *A. Leith* shewed cause :

The judgment was a judgment by default, as for want of a plea displacing the right of action, and consequently was final, and no reference or assessment was requisite.— C. L. P. A. secs. 57, 147 ; Wms. Exrs. 5 Ed. 1794 ; *Sickles v. Asseltine*, 10 U. C. Q. B. 206, per *Draper*, C. J.

The discrepancies as between debt and damages are immaterial, since under the C. L. P. A. it need not appear either in the writ, the declaration, or the judgment, what is the form of action : secs. 9, 73, 76, 240 ; and although the form of execution given by the rule of court uselessly keeps up

the distinction, it is not peremptory, and may be departed from.—*Lowe v. Steele*, 15 M. & W. 380.

The discrepancies are amendable as mere form.—*Elmsley v. McKenzie*, 9 U. C. Q. B. 559; *Short v. Coffin*, 5 Burr. 2730; *Hall v. Thomson*, 9 C. P. 260.

Even though the *fi. fa.* goods be irregular, still the *fi. fa.* against lands is regular, and may well have issued without any prior writ against lands, as the record shews there were no goods, and so there was no necessity for any sheriff's return of no goods. To hold that a writ against goods must precede the writ against lands would be to preclude the plaintiff from all execution, since under the English practice no writ against goods can issue until a return to a *sci. fa.* that there are goods, and thus, if there never were goods, the plaintiff could never reach lands.—Wms. Exrs. 1807.

The suggestion was proper without leave of the court, and no judgment was required thereon.—*Mein v. Short*, 9 C. P. 244, 11 C. P. 430; *Hogan v. Morrissey*, 14 C. P. 443.

No suggestion at all was required, lands being made subject to the same remedies and process for satisfaction of debts as goods, under 5 Geo. ch. 7, sec. 4, 27 Vic. ch. 15, and no suggestion is ever made or required in regard to goods. Such suggestion, if made, is not traversable.—*Mein v. Short*, 9 C. P., per *Draper*, C. J., 244, and so no judgment is required thereon.

Osler, contra :—

The *fi. fa.* against goods here could not be rightly issued without a *sci. fa.*: *Goodtitle d. Murrell v. Badtitle*, 9 Dowl. 1009.

Forms of actions are not wholly dispensed with.—*Kingan v. Hall*, 24 U. C. Q. B. 248; *Hunt v. McArthur*, 24 Q. B. 254.

The judgment here was only interlocutory, and an assessment or computation should have been had or made before final judgment could be entered—*Hayward v. Radcliffe*, 4 F. & F. 500; *Crooks v. Dickson*, 15 U. C. C. P. 523. The *fi. fa.* against the goods was irregular—C. L. P. Act, s. 310; Arch. Pr. 11th ed. 1122, 1132; 2 Saund. 219.

It is not contended that if the plaintiff could rightfully

issue an execution against lands, it was necessary to issue one first against goods: perhaps, a *fi. fa.* against goods need not have been issued.—27 Vic. ch. 15.

Judgment should have been signed here, as in *Gardiner v. Gardiner*, 2 O. S. 520; *Holton v. Macdonald*, 12 U. C. C. P. 246; *Hogan v. Morissey*, 14 U. C. C. P. 441.

The suggestion made of lands could not be rightly made without the leave of the court or of a judge, and judgment should have been signed on the suggestion.—*Watson v. Quilter*, 11 M. & W. 760.

A. WILSON, J., delivered the judgment of the court.

The judgment roll shews that the plaintiff owed the defendant on a promissory note, made by the intestate payable to T. B. Wakefield or bearer, in the sum of \$300 and interest, one year after its date; and that the insolvent was the bearer of the note at the time the attachment was issued against him.

The defendant pleaded *plene administravit præter*, and an outstanding judgment greater than the goods on hand.

The plaintiff confessed the truth of the plea, and prayed judgment and his damages of assets *quando*. There is a subsequent prayer of judgment and his said debt, together with his damages by him sustained, as well on occasion of the detention thereof, as for his costs of suit to be adjudged to him, to be levied of the goods, &c., *quando*.

Then there is the entry of judgment, that the plaintiff do recover the sum of \$404.54 for his damages, and \$26.95 for his costs, to be levied of the goods, &c., *quando*; and then follows the suggestion that the intestate died seised of lands and tenements and entitled to the equity of redemption of lands and tenements; and a prayer that the amount so recovered be levied of the lands and tenements and equity of redemption of lands and tenements, of and to which the intestate died seised and entitled.

From the position of parties to the note, there was no privity of contract between the intestate, who was the maker, and the insolvent, who was not the payee, but the

bearer of it merely ; and it cannot be inferred in any way that there was such a privity between these parties as would entitle the insolvent to sue the intestate in debt. If an I. O. U. be produced, the person producing it is presumed to be the person to whom it is payable ; but it may be shewn that the person producing it is not the one to whom it was given, but is only the assignee of it.—*Curtis v. Rickards* (1 M. & G. 46). Here it requires no extraneous evidence to shew that the insolvent and intestate were not parties in immediate privity ; for it is apparent on the face of the instrument sued upon, and therefore *debt* in its technical form could not be brought by the insolvent against the intestate.

By the C. L. P. Act, sec. 9, the form or cause of action need not be mentioned in the summons ; and by sec. 55, judgment is final, on default of appearance to a specially endorsed writ.

Sec. 57 enacts, “ If the cause of action in the declaration be for a claim which might have been specially endorsed, and in the event of no plea being filed and served, judgment shall be final, and execution may issue for an amount not exceeding the amount endorsed on the summons, with interest and costs, which costs shall not be more than if the plaintiff had made such special endorsement and signed judgment for non-appearance.”

By sec. 146, “ No rule or order to compute shall be issued.”

By sec. 147, “ In actions where the plaintiff seeks to recover a debt or liquidated demand in money, the true cause and amount of which have been stated in the special endorsement or in the declaration, judgment by default shall be final.”

By sec. 149, “ No writ of enquiry shall issue to a sheriff in cases of judgment by default ; but, except in cases where the judgment is final, the damages shall be assessed by a jury.”

By sec. 161, “ When the damages sought to be recovered are substantially a matter of calculation, the court or judge may direct the amount for which final judgment is to be

signed, to be ascertained by the Clerk of the Crown and Pleas," &c.

In all cases, therefore, where debt could have been formerly brought and the judgment was final, and execution issued without computation or assessment, and in all cases where the plaintiff proceeds by special endorsement, or could have done so, and in the latter case the declaration shews a claim which could have been specially endorsed for, the judgment is now final, without regard to any form of action.

This is the substance of the above enactments, and it is stated to be the practice which is pursued upon them.—Arch. Pr. 11th ed. 975.

Crooks v. Dickson has no application in this case, for that was a suit carried on against a defendant beyond the jurisdiction of the court, and the summons, therefore, was not and could not have been specially endorsed.

There is no question but that the plaintiff might have proceeded by a specially endorsed writ, and there is no question but that the cause of action in the declaration is for a claim which might have been specially endorsed for.

There has not in every sense been, in the words of the statute, "no plea filed and served;" but practically there is *no plea*, for the plaintiff has confessed the truth of the one pleaded, and seeks nothing in opposition to it, and he submits to acquit the defendant in respect of all assets to the present time, and to look to future assets only and to lands. There is nothing whatever now in issue: the demand not being denied is admitted by the defendant.

We think in such a case the plaintiff may take a final judgment.

The judgment, therefore, being final, there is no occasion for a reference or an assessment.

The plaintiff should not, however, have taken more costs "than if he had made a special endorsement, and had signed judgment for non-appearance." Perhaps he has not done so, and \$26.95 may be the proper allowance in such a case. No question of this kind was raised, nor was it

argued that the defendant was entitled to his costs, he having individually succeeded on the record.

The first ground of the rule we decide against the defendant.

The second ground, we think, is maintainable in form, because the present state of the record shews the plaintiff is excluded from suing out any writ against goods and chattels.

The third ground we decide against the defendant, because the plaintiff is entitled to an execution against lands, as there are no goods to be levied upon. If it were not so, and if he had first to issue an execution against goods, which execution he cannot get, it would be an absolute and perpetual denial of justice to him, which we should correct, if the plaintiff were refused his writ by an inferior court, and which we should be especially careful to avoid ourselves.

The provision of law, that execution should not issue against lands until the return of an execution against goods, has not been violated in spirit or substance ; for both parties have agreed on the record that there are no goods attainable by the plaintiff. The purpose of the act has therefore been fully answered.

Ubi jus ibi remedium is a maxim directly applicable in this case.

The fourth and fifth objections are not sustainable. The suggestion has been entered on the roll in pursuance of a much better considered mode of proceeding than formerly prevailed. The present Chief Justice of Upper Canada, in the case referred to, has distinctly established on the most satisfactory grounds the reasonableness and propriety of this course, in place of replying lands, with which the representative has nothing to do, and which usually ended in the useless form of a judgment by default for want of a rejoinder to it ; the effect of which, it might perhaps have been argued, was equivalent to an abandonment of the plea of *plene administravit* ; for judgment for default of rejoining is in many cases the same as a judgment for not pleading, and the pleas are thus got rid of.

The case has not arisen yet making it necessary to consider

whether even a suggestion is required, and when it does the person objecting to the want of it may find he will have very much to do to sustain his argument.

We do not think the judgment or writ against lands should be set aside for any mere formal default: the plaintiff should probably amend the roll, by striking out that part of it which awards judgment to him "for his debt and damages for the detention thereof," which is strictly an entry in a proceeding in debt technically, which this action is not, and by making his writ conform to the judgment and to the form provided by our rule of court. Sec. 240 does not apply to such a case as this, but only to cases where a debt technically is sued for.

We think the rule should be discharged with costs, excepting as to the second ground of objection, and that it be made absolute as to such second ground of objection, with the costs of such part of the rule to be paid by the plaintiff.

Rule accordingly.

HELM V. CROSSIN.

Ejectment—Acquisition of title before writ of possession executed—Stay of proceedings—Amendment of writ after sale of lands thereunder.

Where a defendant in ejectment, after judgment against him, but before writ of possession executed, acquires the title to the land, the court will stay the execution of the writ of possession.

To support a sale of lands under a *fi. fa.*, the writ must correspond with the judgment; but the amendment thereof, even after sale, will cure the defect.

The plaintiff, on the 12th day of February last, claiming title under his father, John Helm the elder, had, under a judgment of this court, sued out a writ of *habere facias possessionem*, entitling him to the possession of a small strip of land lying between two lots of the defendant, who had occupied it with the other lots.

Before this writ was executed, and on the 23rd of May last, *C. S. Patterson* obtained a rule *nisi* on behalf of the

defendant, calling on the plaintiff to shew cause why the execution of it should not be stayed, on the ground that the plaintiff was not entitled to the possession of the premises recovered, but that the defendant, as tenant of the honorable James Cockburn and Richard Dover Chatterton, had become entitled, since the recovery of judgment by the plaintiff, to retain such possession, the said premises having been sold by the sheriff and acquired by the said Cockburn and Chatterton.

On moving this rule the defendant read affidavits shewing that on the 7th day of November, 1859, Thomas Dumble, the younger, recovered a judgment in the Queen's Bench for \$730 $\frac{81}{100}$ against Ebenezer Perry, George Perry, and John Helm, the elder, father of the now plaintiff, which judgment had been duly registered; that on the 15th September, 1863, a writ of *fi. fa.* against lands had issued on the judgment, and had been on the same day delivered to the sheriff of the united counties of Northumberland and Durham, and duly renewed from time to time; that on the 9th of October, 1865, the sheriff advertised the land to be sold at Cobourg on the 13th day of January following, under this and another writ, at the suit of James Hodges against D'Arcy E. Boulton, Ebenezer Perry and George Perry; that at this sale Thomas Dumble, the younger, became the purchaser of this lot, as the highest bidder, for \$130; that since the purchase he had sold and conveyed the land to Cockburn and Chatterton; that the plaintiff claimed this land under a conveyance from John Helm, the elder, dated the 13th day of March, 1865, when the said writ of *fi. fa.* against lands was in the sheriff's hands; that among the bidders at the sale was John Helm, the elder, the execution debtor, who stated there that he was bidding on behalf of the now plaintiff, John Helm.

In Easter term *W. H. Burns* shewed cause. He read affidavits shewing that no judgment had been recovered by Thomas Dumble, the younger, for the amount stated in the

writ of execution upon which these lands had been sold; that the writ was believed to be irregular and the sale under it invalid; that notice had been given at the sale by John Helm, the elder, forbidding it as being irregular, but that seeing the sheriff determined to sell, he bid upon it for his son, the plaintiff, hoping to get it for a small sum and so prevent litigation.

A copy of the writ of *fi. fa.*, under which the land was sold, was put in by the plaintiff. The recovery was stated in the writ to be for \$730 $\frac{81}{100}$, but the endorsement was that the damages were. £285 8s. 9½d., costs £16 11s. 11d., £12 for writs. There was a credit given of £111 3s. on the 20th February, 1860, and for \$477 $\frac{59}{100}$ on the 31st July, 1862, the sum endorsed for damages and costs being the amount for which the judgment had been recorded.

He contended that the execution was irregular and void, and the court ought not to interfere, but let the plaintiff have possession, and leave the defendant to recover it, if he could, under this sale by the sheriff.

Patterson, contra, contended, first, that there was a judgment to sustain the *fi. fa.*, which was erroneous in this, that it should have been one for residue only, instead of one for the sum remaining due.

2ndly. That it was an irregularity only, and was amendable.

3rdly. That the plaintiff had no standing to set up an irregularity in these proceedings. He cited *Andrus v. Page*, Tay. U. C. R. 348; *Fisher v. Brookes*, 3 O. S. 143; *Doe Spafford v. Brown*, 3 O. S. 92; *Farr v. Arderley*, 1 U. C. Q. B. 337; *Commercial Bank v. McDonell*, 1 U. C. Q. B. 406; *Doe Myers v. Myers*, 9 U. C. Q. B. 465; *Doe Elmsley v. McKenzie*, 9 U. C. Q. B. 559; *Osborne v. Kerr*, 17 U. C. 134; *Oswald v. Rykert*, 22 U. C. 306, and p. 308, per *Hagarty, J.*; *Ontario Bank v. Muirhead*, 24 U. C. 563, and p. 569, per *Draper, C. J.*; *Balfour v. Ellison*, 3 Pr. Reps. 30; *Perrin v Bowes*, 5 U. C. L. J. 138.

J. WILSON, J., delivered the judgment of the court.

This is an application to stay the execution of a writ of *hab. fac. poss.*, on the ground that the plaintiff has since the recovery lost his right to the possession of the land, and that the title is in the defendant.

It is resisted on the ground, that the defendant has not shewn such a title as would enable him to recover against the plaintiff.

John Helm, the elder, was the owner of this land. The plaintiff recovered his judgment through a conveyance from him; but the defendant says, "At the time this conveyance was made there was an execution against the lands of John Helm, the elder, in the hands of the sheriff, upon which my landlords bought this land, which displaced your title, and you ought not to be permitted to turn me out."

If the defendant could recover against the plaintiff, if he were let into possession, it seems to be conceded that this execution ought to be stayed. Now, the whole point in the case is, whether the judgment sustains the execution upon which the sheriff made the sale.

On the 7th of September, 1859, Thomas Dumble, the younger, recovered a judgment in the Queen's Bench for £285 8s. 9d., and £16 11s. 11d. costs, which he registered in the county where these lands are situated. On the 15th of September, 1863, he sued out an execution against lands, in which a judgment for \$730.81 only is recited, which he immediately placed in the sheriff's hands, and which he kept renewed from time to time. On this writ these lands were sold and conveyed to Dumble, and by him to the landlords of the defendant. Does that judgment sustain this writ? We think it does not, and, therefore, on the present shewing of the defendant, he would not be entitled to recover against the plaintiff, in case an action had been brought on this deed from the sheriff.

We cannot but regret that no steps have been taken to amend the writ before the application was made, for the

court could only act on a clear shewing of title to stay the execution on its own judgment which the plaintiff had obtained.*

* Giving of the above judgment, which had been previously prepared, was suspended until the present Trinity term, when it was shewn by affidavit that the *fi. fa.* on which the lands had been sold had been amended by making it correspond with the judgment, and the court now made the rule absolute to stay the execution of the writ of possession, on payment by the defendant of the costs of the ejectment suit and of this application.—REPORTER.

STEINHOFF AND WIFE V. BURTCH.

Conveyance in fee—Lease for five years—Evidence.

The evidence shewed that A. B., the ancestor of the female plaintiff, through whom title was claimed, lived on the land in question in 1832, claiming it as his own, until 1843, when he left it; and a witness deposed to having been told by A. B. and another that they had exchanged farms and made deeds to one another, the witness stating that he had read the deed to A. B., dated before 1832. Another witness, the second wife of A. B., stated she gave to W. B., a son of A. B., and husband of defendant, the deed in question; and there was also evidence that W. B. before his death told a witness examined at the trial that he had got this deed, which he shewed to witness:

Held, sufficient evidence of a deed in fee to A. B.

A witness testified that A. B. leased the land to B. for five years; that both parties had informed him of this; that B. went into possession and told him he was tenant to A. B.; and that he remained on the land till the fall of 1843; that W. B. moved on and lived there with B.; and that both said the former had bought out the balance of the latter's term; that he heard of both having gone to one L. to have the lease assigned, and W. B. said they had been there to get "the writings" signed. Another witness, the second wife of A. B., stated that B. had a lease for five years from March, 1843, at a certain rental; and that B. and her husband had both told her the terms of the lease. A third witness, the wife of B., said that her husband and she moved on to the land in 1843 under a lease from A. B., her father, for five years, and that her husband lived there for several months, when he sold out to W. B: *Held*, sufficient evidence to warrant a jury in presuming a lease both in law and in fact for five years from March, 1843; and that from such evidence the lease might have been inferred to have been in writing; first, because there could not have been a valid lease in 1843 for five years except in writing; and secondly, because W. B. spoke of the assignment from B. to him as being in writing.

Ejectment to recover the west half of lot No. 19, in the 14th concession of the township of Windham, in the county of Norfolk.

The plaintiffs' notice of title was that they claimed on behalf of the wife, as one of the heiresses-at-law of Archibald Burtch, deceased, and at the time of his death the owner in fee simple, by virtue of a deed thereof in fee from one Joseph Wilson.

The defendant, besides denying the plaintiffs' title, claimed title by length of possession by herself and those through whom she claimed; and also by virtue of an indenture, bearing date the 3rd of January, 1866, made between John Ansley Wilson, of the first part, Margaret, his wife, of the second part, and the defendant, of the third part.

The cause was tried at the last spring assizes for the county of Norfolk, held before the Chief Justice of this court, when a verdict was found for the plaintiffs for an undivided one-sixth part of the premises.

In Easter term last *Anderson*, for the defendant, obtained a rule calling on the plaintiffs to shew cause why the verdict for the plaintiffs should not be set aside and a new trial had, for the misdirection of the learned Chief Justice in telling the jury that the fact of Archibald Burtch, through whom the plaintiffs claimed, being out of the province, gave the present plaintiffs ten years from the time at which her right accrued to bring the action; and on the ground that there was no sufficient evidence of Archibald Burtch having been seised in fee of the land in dispute; and that there was no sufficient evidence of any lease from Archibald Burtch, as alleged by the plaintiffs, or of the death of Archibald Burtch, or of the time of his death.

In Trinity term last *Read*, Q. C. (*Livingstone* with him) shewed cause:—

Burtch having made a lease to Daniel Butler in 1843 for five years, the time did not begin to run against Burtch until the expiration of the lease in 1848, and therefore Burtch's title and the title of those claiming under him have not been barred by length of time: *Doe Davy v. Oxenham*, 7 M. & W. 131; *Doe Johnson v. Liversedge*, 11 M. & W. 517; *Chadwick v. Broadwood*, 3 Beav. 308; U. C. Consol.

Stats. ch. 88, sec. 2, sub-secs. 1-4, and secs. 45-52; *Canada Co. v. Weir*, 7 U. C. C. P. 341.

This defendant obtained possession from and claimed title under Butler, the lessee, and is therefore estopped from disputing the lessor's title.

As to the presumption of Burtch's death; it arose at the end of seven years from the time he was last heard of being alive: *Doe Johnson v. Liversedge*, before cited; *Doe Hagerman v. Strong*, 4 U. C. Q. B. 510; *Omanney v. Stilwell*, 2 Jur. N. S. 1058.

The defendant contends that the 25 Vic. ch. 20 prevents the absence of a party from the province from operating any longer as a bar to the running of the period of limitation against his rights; but the twenty years have not in the plaintiffs' view yet expired, and the statute only applies when the person who was absent is himself the plaintiff in the suit, and not when another person is claiming through such absent person: in the latter case the absence from the province may still be relied on as a saving or extension of the party's rights.

Robinson, Q. C., contra:—

The alleged lease for five years is disputed by the defendant. There was no such lease in writing; but if there had been a lease, no assignment of it was proved to the defendant's husband, and he was not therefore, nor is the tenant, estopped by the lease. No rent was ever paid by any one to Archibald Burtch. From the evidence, Butler, the supposed lessee, and those claiming under him, can at most be considered as in the light of parol lessees not having paid rent, and the nature of such an interest is explained in Roscoe's N. P. Evidence, 10 Ed. 260; *Berrey v. Lindley*, 3 M. & G. 512.

Archibald Burtch's own title was not sufficiently proved by any possession: *Shaver v. Jamieson*, 25 U. C. Q. B. 156; nor by any other means.

The period of limitation commenced to run at the end of one year from the making of the parol lease in 1843 to

Butler, because there was no valid five years' lease found: *Asher v. Whitlock*, 1 Law Rep. Q. B. 1.

There is no further period to be allowed to Archibald Burtch, or to any one claiming under him, by reason of his absence from the province, since the passing of the 25 Vic. ch. 20. The Imperial Act, 19 & 20 Vic. ch. 97, sec. 9, as to personal actions, is a provision of the like nature: *Cornell v. Hudson*, 8 E. & B. 429.

But if a further period than twenty years is to be allowed, the plaintiffs have not shewn when Archibald Burtch died, and the onus rests upon them: Taylor on Ev. 4 Ed. 192; *Doe Hagerman v. Strong*, already cited.

A. WILSON, J., delivered the judgment of the court.

The evidence given at the trial shewed that Archibald Burtch was living on the land in question in 1832, claiming it as his own, and that he was living there also in 1836, when he married his second wife, and continued to reside there with her until the 7th of June, 1843, when they moved off.

John Wilson, the former owner of the land, and Archibald Burtch, both told William Wilson they had exchanged farms and made deeds. The witness read the deed of the land from John Wilson to Archibald Burtch: it was dated before 1832.

This deed Jane Burtch, the second wife of Archibald, says she gave to William Burtch, a son of Archibald's by his first wife, and the husband of the defendant in 1855; that when she was ill she sent for William and gave him the deed. Wm. Burtch about eight years before his death, which would be in 1852, as he died in 1860, told Wm. Wilson that he had got his father's deed from his stepmother, who was sick and who thought she would not recover, and he shewed the deed to this witness. It is then said that on William's death, in 1860, his daughter Delilah Glover took the deed at her mother's request and left it with her aunt, Johannah Wilson, the wife of William Wilson, to prevent the plaintiff getting hold of it, and that Delilah Glover got

it back again in 1864. Other two witnesses beside Mr. Wilson swear to this fact. Mrs. Glover denies it. However the fact may be, there is ample testimony to prove the fact of a deed to Archibald Burtch in fee of the land in question, and also of the possession, if necessary, having gone along with the deed: the title of Archibald is very fully sustained.

Then it appears that Archibald made a lease of some kind of the land in 1843, the same year he moved from it, to his son-in-law, Daniel Butler, who immediately moved on to it. The fact of there having been a lease is denied. If there were one, however, it is said it was not in writing, and the terms of it are denied.

Wm. Wilson said: "Archibald leased it to Butler for five years: they both told me so. Butler went into possession. Butler said he was tenant to Archibald Burtch."

Butler was on the place till the fall of 1843, after Archibald had left the country. Wm. Burtch moved on to the place and was living on it with Butler before Butler left it. Both Butler and Wm. Burtch said that William had bought out the residue of Butler's term. William said he was to pay the rent under the lease to Mrs. Burtch for the support of herself and family; that he heard of William Burtch and Butler going to Lundy's to have the lease assigned by Butler to William; and William said they had been at Lundy's to get the writings signed, or fixed.

Jane Burtch said that Butler had a lease for five years from March, 1843, at \$60 a year, which rent she was to get for the support of herself and the two youngest children of Archibald by his first wife; that she herself had no children by him; that Butler and her husband Archibald both told her the terms of the lease.

Julia Butler, the wife of Daniel Butler, said that she and her husband moved on to the land in 1843, under a lease from her father Archibald for five years; that her husband lived on the place from March till November, 1843; that her husband sold out to Wm. Burtch.

There is evidence that Archibald made a lease to Butler for five years from March, 1843, and that Wm. Burtch

entered under this lease. There is evidence from which a jury might infer the lease to have been in writing; first, because there could not have been a valid lease for five years unless by writing, in the year 1843; and secondly, because the assignment from Butler to Wm. Burtch, the latter spoke of as being in writing.

There is no greater stress in presuming a valid lease, that is by writing, from circumstances than there is in presuming a valid deed in fee simple from circumstances. The repeated declarations of Wm. Burtch and of Butler, while they were in possession, that they had a lease for five years, are evidence against them that they held by such a lease in law. Their admission must be taken most strongly against themselves; if it be necessary to give them such an effect; but it is not required to do so here: it is quite enough for the purpose to give them their ordinary meaning, that they had in fact a lease from Archibald Burtch of this land for five years, from March, 1843.

If the plaintiff could not have proved this holding by any such admissions against Butler and Wm. Burtch, and against the defendant, also, who holds from Wm. Burtch, it is very likely they would have failed, because they have not shewn expressly there was a writing, and no rent has ever been paid under the alleged lease; so that no tenancy would seem to have been created. If any rent had been paid it would have been evidence of a tenancy from year to year, which would have been regulated by the terms of the parol bargain, and would have been determinable by efflux of time, at the period thereby agreed upon.—*Berrey v. Lindley*, cited on the argument, and *Lee v. Smith* (9 Exch. 662).

We think a lease in law and in fact for five years, from March, 1843, might have been properly presumed by the jury to have been made.

Under the act of 1834, now consolidated by the U. C. statute, ch. 88, sec. 2, sub-sec. 4, the claim of Archibald Burtch, being an estate and interest in reversion, and no person having obtained the possession or receipt of the rent

in respect of such estate or interest, that is, in respect of his *reversionary* title, first accrued to him in March, 1848, at which time his reversionary estate or interest became an estate or interest in possession.

There is the express decision in *Doe Davy v. Oxenham* (7 M. & W. 131), cited by the plaintiff's counsel on the argument; and as the period is still by several years within the limitation of twenty years, we are not called upon to express any opinion whether the plaintiffs could or could not, if it had been essential to their title, have taken any benefit of the further period of ten years, by reason of the absence of Archibald Burtch from the province at the time his title to possession accrued.

There was evidence given by Betsey Wayne, a cousin of the plaintiff and of Wm. Burtch, that she had heard in 1857 from two of her cousins in Michigan that they had seen Archibald Burtch in Detroit in the year 1856, which probably, as a matter of pedigree, was good evidence of the fact which she mentioned; but no question was argued before us as to any effect which the particular time of Archibald Burtch's death would have in this suit if the period of limitation began to run not sooner than March, 1848; and, therefore, it is not necessary to say how we think the evidence bears as to the time, by presumption or otherwise, of Archibald's death: it has become of no consequence to either party.

The rule will be discharged.

Rule discharged.

REGINA V. SHERMAN.

Mutiny Act—Consol. Stat. C. ch. 100.

Held, per J. Wilson, J., that the Imperial Mutiny Act does not override the Consol. Stat. C., ch. 100, but that the latter was passed in aid of it, and is therefore in force. *Per A. Wilson, J.,* that the punishment by fine and imprisonment, imposed by the Provincial act, stands abolished as long as the Mutiny Act is in force, and that the imprisonment can in no case exceed six calendar months; but that the power of trial by the

Court of Oyer and Terminer, under the Provincial act, has not been taken away by the Mutiny Act; and therefore that the defendant in this case could not complain; as he had been tried by a tribunal of this kind, and sentenced to no longer imprisonment than the last mentioned period; and that, though a fine of 10s. had also been imposed; for this was merely nominal, in compliance with the Provincial Statute, and would not entitle him to be discharged, as the court had power to pass the proper judgment, if an improper one had been given.

The prisoner was indicted, for that not being an enlisted soldier, &c., he assisted one George Woodhouse, a soldier in Her Majesty's military service, to desert, by procuring a conveyance and carrying him from Hamilton, then well knowing Woodhouse to be a deserter.

Plea.—Not guilty.

The jury, after hearing the evidence, found the prisoner guilty on the above count, and the court fined the prisoner 10s., and sentenced him to be imprisoned for six months at hard labor, in the common goal at Hamilton.

In Easter Term, *J. Curran* obtained a rule calling on the Attorney-General to shew cause why the judgment should not be arrested and the prisoner discharged, because the Court of Oyer and Terminer had no jurisdiction to try the offence against the prisoner; the Imperial act, known as the Mutiny Act, providing that such offence should be tried before two magistrates, and said Mutiny Act being in force in this province and overriding the act 22 Vic., ch. 100; the prisoner therefore being only liable to be tried and sentenced under the Imperial act.

During Trinity term *Harrison*, for the Attorney-General, shewed cause, and contended that the 22 Vic., ch. 100, was not repealed by the Mutiny Act, but both were in force, and the Crown might try the prisoner under either. He cited *Attorney-General v. Radloff*, 23 L. J. Ex. 240, 242; *Albon v. Pyke*, 4 M. & G. 421; *Sharp v. Warren*, 6 Pr. 131; *Couch v. Steele*, 3 E. & B. 402; *Reeves v. White*, 21 L. J. N. S. Q. B. 169; *Shepherd v. Hills*, 25 L. J. Ex. 6.

C. Sadlier, for the prisoner, contended that the Mutiny Act repealed the Provincial statute, which was in fact not in force at the time of the trial.

J. WILSON, J.—The count upon which the defendant was convicted is framed on the second section of the Provincial statute 22 Vic., ch. 100, which is a consolidation of the 3rd Vic., ch. 3, sec. 3. It enacts that, “If any person, other than an enlisted soldier, or a sailor engaged in the naval service of Her Majesty, conceals, receives or assists any deserter from Her Majesty’s naval or military service, knowing him to be a deserter, the person so offending is guilty of a misdemeanor, and upon conviction before any such court (of Oyer and Terminer and General Gaol Delivery in Upper Canada) shall be liable to the same punishments mentioned in the preceding section of the act, that is, by fine and imprisonment in the common gaol of the county where the conviction takes place, for such period, being less than two years, as the court may impose, or by imprisonment at hard labor in the Penetentiary for a period not less than two years, in the discretion of the court.”

If there had been any conflict between our act and the Mutiny Act, I should hold the Mutiny Act to override the act of this province; but I see no conflict. The Imperial Parliament provided a mode of trial for this offence co-extensive with the British empire and applicable to all the dependencies of the crown where Her Majesty’s forces may be quartered; and in general its provisions for the prevention of, assisting, or lending aid to deserters may be deemed sufficient.

But our legislature, having special regard to the many inducements held out for soldiers to go to the United States, and to the readiness with which some of our own people, out of mistaken notions of the condition and duties of soldiers, were ready to help them to desert, to the great detriment of the military service and danger to ourselves, passed the act upon which this conviction was had in aid of the Mutiny Act, rather than in conflict with it.

In *Rex. v. Cator* (4 Burr. 2026) Lord *Mansfield* held that the 23 Geo. II. ch. 13 virtually repealed the 5 Geo. I. ch. 27; but it is a general rule that subsequent statutes, which add accumulative penalties and institute new methods

of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes without negative words. Nor has a later act of Parliament ever been construed to repeal a prior act, unless there be a contrariety or repugnancy in them: *Dwarris*, 532, 533.

In *Foster's* case (11 Rep. 63) it was held that the law does not favor a repeal by implication, unless the repugnance be very plain. A subsequent act, which can be reconciled with a former act, shall not be a repeal of it, though there be negative words. The 1 & 2 Ph. & M. ch. 10, that all trials for treason shall be according to the course of the common law, and not otherwise, does not take away 35 Hen. VIII., ch. 2, for trial of treason beyond sea.

The Mutiny Act provides a mode of punishment for this offence which may be resorted to here on its authority, but this is not repugnant to trying the offence as a misdemeanor under the authority of our provincial statute, which institutes another method of proceeding, and a greater punishment than the Mutiny Act prescribes. Here the crime is more easily committed than in any other part of Her Majesty's dominions: here too it may be of more serious consequence, and hence the necessity of the provincial act.

An act similar to the present has been in force in this province since the 3 Vic. Mutiny acts, in substance like the act of this year, have been passed from year to year since 1847, though varied a little by the act of 1862: all our courts have acted upon our provincial statute as in force, notwithstanding these military acts. I think, therefore, our provincial act is in force.

A. WILSON, J.—If the imperial statute had made the offence a felony, and our statute had made it only a misdemeanor, I think our statute being repugnant to it would be avoided; it would be virtually repealed: *Michell v. Brown* (E. & E. 267, 5 Jur. N. S. 707).

The two statutes are to be considered as if they had both been English acts, or as if they had both been enacted by our own legislature.

In this view one act provides that the punishment shall be by fine and by imprisonment in gaol, if for less than two years, or by imprisonment alone for not less than two years in the penitentiary, and that the prosecution shall be before a Court of Oyer and Terminer and General Gaol Delivery; while the other declares that the punishment shall be by imprisonment in the gaol or house of correction with or without hard labor, for a term *not exceeding* six calendar months, and that the prosecution shall be before any two justices for the locality where the offender may happen to be.

The rule is that *leges posteriores priores contrarias abrogant*: 11 Rep. 63. If both statutes be in the affirmative, they may both stand; but if the one be a negative and the other an affirmative, or if they differ in the matter, although affirmative, the last shall repeal the first; as the 33 Hen. VIII. ch. 23, which directed, that if any person, being examined before the King's Council, shall confess any treason, &c., he shall be tried in any county where the king pleases, was held to be repealed by the 1 & 2 P. & M. ch. 10, which directed that all trials thereafter to be had for any treason should be had according to the course of the common law and not otherwise; and Lord *Coke* adds, "The latter act, although the words had not been," [*i. e.*, "and not otherwise,"] "hath abrogated the former, because this were contrary in matter": see *O'Flagherty v. McDowell* (4 Jur. N. S. 33). So it is there also said that if there be "contrariety in respect of the form prescribed," a repeal will also be effected.

One statute, which inflicts a penalty of 12d. for every Sunday and holiday, is not at variance with another statute which inflicted the penalty of £20 by the month; for the one fine is forfeited as soon as the Sunday or holiday is past, but the other is not forfeited till the end of the month.

And the 28 of Eliz., which enacted that every conviction thereafter should be in the Court of King's Bench, or before the justices of assize, &c., and not elsewhere, was held not to abrogate the whole power of other justices who had power

by the 23rd of Eliz; for any of them might take an indictment, for the later act applied only to the *conviction*, so that the power to take the indictment remained.

So, when a statute makes a new law and assigns certain persons to execute it, although the justices of the King's Bench are not by express words authorized by the act, yet they may execute it; but justices of Oyer and Terminer or Gaol Delivery, &c., shall not execute it.

In *Rex. v. Cator* (4 Burr. 2026) the penalty for the first offence was by the earlier statute £100 and three months' imprisonment, by the latter £500 and twelve months' imprisonment; for the second offence, by the earlier act, fine at discretion and twelve months' imprisonment in the county gaol, and by the latter £1000 and two years' imprisonment.

Mr. Justice *Aston* said: "By the latter act there was no discretion left in the court: the punishment directed by it is peremptory. The former act directs the fine for the first offence to be in any sum *not exceeding* £100; and so it was held the first act had been repealed."

So, if an offence be a felony by one statute, and be reduced to a misdemeanor by a later statute, the first statute is repealed: *The King v. Davis* (I. Leach's C. C. fol. 271, case 135).

Parry v. The Croydon Consolidated Gas & Coke Co. (11 C. B. N. S. 579).—By the Croydon Improvement Act a penalty of £200 was imposed on any gas or other company for suffering any impure matter to flow into any stream, &c., to be sued for by any common informer. By a section of a later statute, relating to gas companies, a like penalty was imposed for the same offence, to be recovered by the person who was injured: *Held*, the latter provision was a repeal of the former.

Prior to 1847 there does not appear to have been any special legislative provision in England against persons who induced or attempted to induce soldiers to desert, of the nature of the present enactment: the law before that time seems to have been regulated by the 37 Geo. III. ch. 70, and 7 Wm. IV. and 1 Vic. ch. 91.

In 1847 a clause was inserted in the Mutiny Act substantially the same as the clause in the present Mutiny Act to

meet such a case, but making the offender "liable to be punished by fine or imprisonment, or both, as the court before whom such conviction shall take place may adjudge;" and this provision continued in each yearly act until the year 1862, when by the act for that year (25 Vic. ch. 5, sec. 81) it was enacted that on conviction of the offender "before any two justices acting for the county, district, city, borough or place where the offender shall at any time happen to be, [he shall] be liable to be committed to the common gaol or house of correction, there to be imprisoned with or without hard labour for such term, not exceeding six calendar months, as the convicting justices shall think fit;" and this provision has been made yearly down to the present time, and is now the law of England.

While, therefore, by the imperial act the punishment is *not to exceed* six calendar months' imprisonment, with or without hard labour, by our own act the punishment, if in the common gaol, must be by both fine *and* imprisonment, there being no discretion to dispense with either the fine or the imprisonment, and the imprisonment *may* be for any period less than two years in the gaol, or for any period *beyond two years* in the penitentiary; and hard labour follows of course in the latter case.

Now, the punishment being so entirely different, and the two acts being so irreconcilable, the maxim of *leges posteriores* not only applies, but the provincial act, especially on a subject for the regulation of the army, which is a purely imperial matter, must necessarily give way to the imperial statute, whether the imperial act be anterior or posterior to it.

In my opinion the punishment imposed by our own statute has been and must remain suspended so long as the Mutiny Act is in force. I do not think the power of trial by the Court of Oyer and Terminer and General Gaol Delivery under our statute has been taken away by the Mutiny Act; for the trial by two justices under the latter act is only in the affirmative and may well stand with the provisions of our act: *Daw v. Metropolitan Board Co.* (12 C. B. N. S. 161, 8 Jur. N. S. 1040.)

The conclusion I come to is, that the power of fine *and* im-

prisonment by the provincial act has been abolished, and that the imprisonment can in no case exceed six calendar months.

This defendant has, therefore, nothing to complain of, for he was tried by the proper tribunal, and was sentenced to no longer imprisonment than this last mentioned period.

The pecuniary fine of ten shillings was merely nominal, to comply with the double punishment prescribed by our own act; but the defendant could not have been discharged altogether on this account, as this court has the power to pass the proper judgment, if the wrong one has been given; and if it be wrong in this case it is only nominally so.

From the many doubts which I had heard expressed on the subject, and the doubts which I naturally felt in consequence, I refrained from expressing any opinion on the case at the trial. I think judgment should be pronounced remitting the fine of ten shillings; but, as there is a difference in the court, the result is the rule must fall altogether.

Judgment accordingly.

IN THE MATTER OF JAMES THOMAS LAMB, AN INSOLVENT.

Insolvent Act of 1864, sec. 11, sub-sec. 2—Adjournment—Power of judge to direct proceedings in Chancery before second meeting—Right of assignee to select his own legal adviser.

A disagreement having arisen between the majority in number and the majority in value of the creditors of an insolvent, a motion to adjourn, under sec. 11, sub-sec. 2 of the Insolvent Act of 1864, was opposed by the latter; whereupon application was made to the judge of the County Court to dispose of the matter, who ordered that the majority in number might proceed in Chancery, in the assignee's name, against the majority in value.

Seemle, that neither party could legally oppose the adjournment, if it was insisted upon by the other, as it would have the effect of empowering the objecting party to prevent the judge from adjudicating between them, as intended by the act; but that such adjournment should have followed as of course, and upon a similar division of opinion the judge should have decided between the two sets of resolutions, and might then have directed the assignee to proceed in Chancery or otherwise contest the claim of those creditors whose debt was disputed. But

Held, that the judge had power to make the order in question, and it was not, therefore, advisable to interfere with it.

The assignee has the sole right to select his own professional adviser, and he cannot be made to change him, except upon reasonable ground.

This was an appeal from the judge of the County Court of the county of Carleton, in insolvency.

The appellant, who was the assignee of the insolvent estate, petitioned this court stating—

First. That on or about the fourth day of July, A. D. 1866, the appellant was duly served with a petition purporting to be a petition by the above named respondents to the judge of the County Court of the county of Carleton, complaining, 1. That the petitioners were creditors of the estate of the above named insolvent. 2. That previous to the commencement of proceedings in insolvency herein, and on or about the twelfth day of July, 1865, a writ of *fiery facias* was issued against the goods and chattels of the said James Thomas Lamb, which writ was founded on a judgment fraudulently and improperly recovered in the Court of Common Pleas for Upper Canada against the said James Thomas Lamb by John Converse, Charles Edward Coulson and John Lamb, on a certain promissory note, given by the said James Thomas Lamb to the said parties, under the name and style of Converse, Coulson and Lamb, for an amount sufficient to cover the face of certain other notes of the said James Thomas Lamb, made to and then held by the said Converse, Coulson and Lamb, some of which were not then due or payable, and the said James Thomas Lamb conspired with the said Converse, Coulson and Lamb to defraud the petitioners and his other creditors, and it was agreed and understood between them that the said James Thomas Lamb should give the said Converse, Coulson and Lamb the said note for the whole of the notes then held by them, and that such note should be made and dated in such a manner as to accelerate the indebtedness of the said James Thomas Lamb, and so that the said Converse, Coulson and Lamb should and might be able to sue for the same and recover judgment thereon, and obtain priority over the other creditors of the said James Thomas Lamb, and in pursuance of such understanding and agreement, and for the improper purposes aforesaid, and to obtain the aforesaid preference, the said first mentioned note was antedated, and the said Converse, Coulson and Lamb were thereby enabled to put the same at once in suit and recover judgment thereon in

advance and in preference of any other creditor ; and in further pursuance of the said conspiracy, by the connivance of the said James Thomas Lamb, and in the agreement and understanding aforesaid, the said James Thomas Lamb entered no defence to the said suit, and judgment, therefore, went by default. 3. The said Converse, Coulson and Lamb had realized a large sum of money in their said judgment, and in fact had absorbed nearly the whole of the assets of the estate, so that what remained was barely sufficient to pay the costs of the proceedings in insolvency, and the said Converse, Coulson and Lamb had bought up the claims of several other creditors of the estate, with the view of securing to themselves the majority in value of the votes cast at meetings of the creditors, and of controlling the proceedings and preventing any action which might have for its object the recovery and realization for the benefit of all the creditors of all the assets of the insolvent. 4. At a meeting of the creditors of the said insolvent, held at the office of the assignee, in the city of Ottawa, on the twenty-seventh day of February last, a motion authorizing the assignee to proceed by bill in Chancery or otherwise, as he might be advised, for the purpose of compelling the said Converse, Coulson and Lamb, and any other creditor who might have secured any fraudulent preference, to account to such assignee for all moneys by them received in virtue of such fraudulent preference, was supported by the majority in number of the creditors for sums over one hundred dollars, and opposed by the creditors pretending to be the majority in value of the creditors; and a motion to adjourn the said meeting was in like manner supported by the majority in number and opposed by the creditors pretending to be the majority in value of the creditors ; but the only creditors who opposed the said resolutions were the said Converse, Coulson and Lamb, who used the names of several other creditors, whose claims had been bought up by them for the express purpose of getting to themselves the majority in value of votes, and Henry Ingles, the father-in-law of the said insolvent, and one Patrick Fitzsimmons,

whose claim was small, and who formerly was book-keeper to the said insolvent. 5. Since the date of the said meeting the petitioners, who were the creditors supporting the said resolutions, had incurred considerable expense in endeavoring to get the assignee in charge of the estate to take measures for obtaining redress against the said Converse, Coulson and Lamb, and had offered to indemnify the said assignee, in case he should think fit to file a bill in the Court of Chancery, but the said assignee had wholly neglected and refused to act in the premises, to the great injury of the petitioners.

The petitioners therefore prayed, 1. That the judge would be pleased to order that they might be at liberty to file a bill in Chancery with respect to the matters therein set forth, in the name of Francis Clemow, Esq., assignee of the said James Thomas Lamb, upon giving to the said assignee an indemnity against the costs of such proceeding satisfactory to the Judge, or to the Master at Ottawa of the said Court of Chancery. 2. Or that the said judge might make such other order in the premises as to him should seem just.

The appellant then went on to state,—

Secondly. That on the said petition a notice to the assignee was endorsed, that the petition would be presented to the judge on the following Friday, and that he was required to produce the evidence of the witnesses examined on the tenth and eleventh days of December, and the eighth day of February previously, the minutes of the meeting of creditors held on the twenty-seventh day of the same month, the schedule of creditors whose claims had been filed, with the value of their respective claims, and all other documents of whatever kind in his possession, custody or power, relating to the matters referred to in the within petition.

Thirdly. That on the day after the hearing of the said petition, the appellant duly attended before the learned judge of the County Court of the county of Carleton, and then and there submitted to his honor that, if his honor had jurisdiction in the premises to grant the relief prayed, any order that his honor might make would be obeyed.

Fourthly. That on the tenth day of July (A. D. 1866,) the appellant was duly served with an order made by said judge that day, directing the appellant to consult J. B. Lewis, of Ottawa, Esquire, as to the management of the said estate.

Fifthly. That subsequently the appellant consulted his solicitor, as directed by the said order, and on Friday, the twentieth day of July, (A. D. 1866) submitted to said judge a report in writing of the advice received, stating that he had been advised under the circumstances to take proceedings in Chancery against Converse, Coulson and Lamb, or any other party, that the majority in number of creditors alleged to have obtained any undue or fraudulent preference, upon such majority in number furnishing indemnity to the satisfaction of his solicitor.

Sixthly. That on the said twentieth day of July (A. D. 1866) said judge made a final order in the premises, directing that the respondents were at liberty to file a bill in Chancery in the name of the appellant.

Seventhly. That the appellant was advised that the said judge had no jurisdiction to grant the relief prayed for in the terms prayed for, or to make the said final order, and he appealed therefrom on the following grounds :

1st. That it was not a duty imposed upon the appellant by this deed of assignment by instructions from the creditors validly passed by them under the said act and communicated to him, or by the terms of the said act, that the above named respondents, being creditors, or any of them, or any creditor, should be at liberty to file a bill in Chancery in the name of the assignee on the terms mentioned in the said order, or on any terms whatever ; and, not being such a duty so imposed, its performance could not be enforced by the learned judge in a summary petition in vacation, under sub-section sixteen of section four of the said act.

2nd. That neither the Insolvent Act of 1864, nor the practice or procedure of the County Court, authorized or empowered the learned judge to fix the amount of the bond of indemnity to be given by the above named respondent to

the appellants, on their taking proceedings in Chancery in his name, nor to direct a reference to the deputy clerk of the crown to determine the sufficiency thereof.

Eighthly. That the appellant was desirous of winding up the estate in the manner prescribed by the act, without prejudice to any creditor or any section of creditors; that he was anxious to do what was right and just in the premises, and was prepared, by his own solicitor or attorney, upon being provided with the necessary funds and properly indemnified, to take any steps in Chancery, or otherwise, that any section of creditors, either majority in number or value, might desire. But under the order appealed against proceedings were ordered to be taken, not by the appellant's solicitor or attorney, but by the solicitor or attorney of the above named respondents, in whom the appellant had no confidence, who would be at liberty thereby to take such proceedings as he or they deemed necessary, or otherwise, in the name of the appellant, without the knowledge or control of the appellant, who might thereby be seriously damaged; whilst, on the other hand, the solicitor or attorney, whom the appellant would employ, would have no interest, direct or indirect, and would not represent any creditor or creditors of the estate, and would be one in whom alone the appellant had that confidence so necessary between solicitor or attorney and client.

In Trinity term last *S. Richards*, Q. C., for the appeal :

The judge below had no authority to make the order that the creditors might file a bill in Chancery in the assignee's name: he had no power to take the management of the estate out of the hands of the assignee and to give it to the creditors.

The Insolvent Act of 1864, sec. 2, sub-sec. 7, sec. 3, sub-sec. 22, sec. 4, sub-secs. 7, 8, 9, 11, 13, shew the whole estate of the insolvent is by the statute vested in the assignee; and shew, also, the powers which the assignee may exercise, and how he may exercise them. He is the person who is to act, and he is to do all acts in his own name.

As to the securities of certain of the creditors which are alleged to be void, and certain acts of these creditors which are complained of, the statute provides means of avoiding them, and of protecting the general creditors: sec. 8, sub-secs. 3-4; and the assignee has never refused, but, on the contrary, has always been willing to do whatever was required of him for the benefit of the estate, if the creditors, who were pressing him to proceed in Chancery, would only furnish him with funds to enable him to act.

The assignee has been obliged to give security for the due performance of his duties: sec. 4, sub-secs. 2-6; and if he do not perform them, he may be removed by the creditors, or by the judge: sec. 4, sub-secs. 17-18. It cannot be assumed, then, that, while he is still permitted to be assignee, he has been guilty of any of his duties, and if he have not, and it is expressly alleged he has not, which is not denied, neither the creditors nor the judge had the right to displace him in effect, yet keep him bound for all that was being done in his name.

If it had been desired to take the control of affairs from the assignee, he should have been removed.

It is not disputed that the assignee is subject to the general orders and jurisdiction of the judge: sec. 4, sub-secs. 4, 16, 19.

The mode in which the directions of the creditors are to be expressed and made binding on the assignee, is pointed out in sec. 11, sub-sec. 2, and in the Insolvent Act of 1865, secs. 21-22.

Robert A. Harrison, contra:—

The act creates a court of bankruptcy: the assignee is an officer of the court: he is appointed by the judge: sec. 3, sub-sec. 14.

The judge has the settlement of any petition respecting a suspension of the whole proceedings in insolvency (sub-sec. 17), and his determination of the claims of the creditors for the purpose of voting (sub-sec. 21), and an appeal lies to him from the decision of the assignee as to dividends (sec. 5,

sub-sec. 13, and sec. 7, sub-secs. 1-2), and he has other very extensive powers conferred upon him by the act.

The minority of the creditors could not file the bill in their own names, nor in the name of the assignee, of their own motion: *Heath v. Chadwick*, 2 Phil. 649; *Yewens v. Robinson*, 11 Sim. 105; *Ex parte Walmsley*, 13 L. T. N. S. 24.

A creditor may be authorized to bring a suit in the assignee's name, on indemnifying him: *Ex parte Ryland*, 2 Dea. & Ch. 392; *Ex parte Pooley*, 10 L. T. N. S. 102; *Piercy v. Roberts*, 1 M. & K. 4; *Casborne v. Barsham*, 6 Sim. 317; *Fletcher v. Fletcher*, 4 Hare, 67.

The judge had the right to make the order in question, and there is no appeal against his discretion: *Ex parte Maw*, 11 Jur. N. S. 69; *Anonymous*, 11 L. T. N. S. 466.

A. WILSON, J., delivered the judgment of the court.

The assignee, by sec. 3, sub-sec. 22, takes by virtue of his appointment, and has vested in him all the estate of the insolvent, "in the same manner, and to the same extent, and with the same exceptions as if a voluntary assignment had been at that day executed in his favor by the insolvent;" and he shall, by sec. 4, sub-sec. 4, "be subject to all rules, orders and directions not contrary to law or to this act, which are made for his guidance by the creditors at a meeting called for this purpose."

By sub-sec. 9, "He may sue for the recovery of all debts due to the insolvent, and may take, both in the prosecution and defence of suits, all the proceedings that the insolvent might have taken with respect to the estate, &c."

By sub-sec. 16, "The assignee may be subject to the summary jurisdiction of the court or judges in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction; and the performance of his duties may be enforced by the judge, on summary petition in vacation, or by the court on a rule in term, under penalty of imprisonment as for contempt of court, whether such

duties be imposed upon him by the deed of assignment, or by instructions from the creditors validly passed by them under this act and communicated to him, or by the terms of this act."

By sub-secs. 17 and 18 the assignee may be removed by the judge or by the creditors.

By sec. 5, sub-sec. 13, "If any dividend be objected to within six days, and any dispute arise between the creditors, or between the insolvent and any creditor, as to the correct amount of the claim of any creditor, or as to the ranking or privilege of the claim of any creditor upon such dividend sheet, the assignee shall obtain from the creditor, whose claim or ranking is disputed, his statements or vouchers, &c., and shall hear and examine the parties, &c., and shall make an award in the premises and as to the costs of contestation, which award shall be deposited in the court and shall be final, unless appealed from within three days from the date of its communication to the parties to the dispute."

By sec. 7 there is an appeal to the judge from the award, and by sub-sec. 2 a further appeal to the superior courts of common law, or to a judge of any of such courts, from the decision of the judge.

By sec. 8, sub-sec. 3, "All contracts or conveyances made and acts done by a debtor, with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done and intended, with the knowledge of the person contracting or acting with the debtor, and which have the effect of impeding, delaying or obstructing the creditors in their remedies, or of impeding them or any of them, are prohibited, and are null and void," &c.

By sec. 11, sub-sec. 2, "All questions discussed at meetings of creditors shall be decided by the majority in number of all creditors, for sums above \$100, present or represented at such meeting, and representing, also, the majority in value of such creditors, unless herein otherwise specially provided; but if the majority in number do not agree with the majority in value, the meeting may be adjourned for a

period of not less than fifteen days, of which adjournment notice by advertisement shall be given ; and if the adjourned meeting has the same result, the views of each section of the creditors shall be embodied in resolutions, and such resolutions shall be referred to the judge, who shall decide between them."

This appeal is prosecuted before us under the act of 1865, sec. 15.

It appears by the petition originally presented to the judge of the County Court that there was a disagreement between the majority in number and the majority in value of the creditors, and that a motion to adjourn was opposed by the majority in value, and that upon such refusal to adjourn, the application was made to the judge to dispose of the matter.

I am inclined to think that neither party could legally oppose the adjournment if insisted upon by the other, because it would have the effect of giving to the objecting party the power to prevent an adjudication between them by the judge, who in this case and in other instances [sec. 3, sub-secs. 14-21, sec. 6, sub.sec. 1, sec. 9, sub-secs. 8, 10, 12] is to be the referee on divisions or differences arising.

The adjournment should, I think, have followed as of course, and if on the like division of opinion still prevailing at the second meeting, the judge could and should have decided between the two sets of resolutions.

This would have been the formal and proper course. The judge might then have directed the assignee to take the necessary proceedings in Chancery, or otherwise to contest the claim of those creditors whose debt is disputed ; and the costs of the contestation would probably, in the event of the ordinary direction being given to the assignee to sue, have been payable out of the estate (sec. 5, sub-sec. 15), if the result of the suit had been adverse to the assignee.

The judge and the majority in number of the creditors seem to have assumed that the judge was in a position to decide between the opposing parties, by reason of the refusal to concur in an adjournment, just as if the second meeting

had been held and the same disagreement had still continued.

But when he did entertain the petition, it was as on a difference between the majority in number and the assignee, who, it was said, refused to adopt the necessary Chancery proceedings, and he acted as on a difference between the creditors representing the majority in number and the majority in value; and, so far as I see, the creditors representing the majority in value were not before the judge at all or in any manner heard by or represented before him.

It is scarcely probable that the majority in value would have concurred in any proceeding against themselves, if they had been heard or had been present; and I am not quite sure how far it is advisable to encourage any deviation from the prescribed course given in the act, when there is no valid reason why that course was not duly carried out.

I do not, however, feel quite warranted in interfering with the order so made, particularly as the majority in value of the creditors, who have brought about the difficulty by wrongfully thwarting the adjournment, are the parties principally affected by the order, if the judge had the jurisdiction to make it upon the matter coming more favorably before him for his determination.

The assignee has the appointment of the solicitor for the estate: *Ex parte Tomlinson* (2 Rose, 66); but where the assignees appointed a solicitor connected by marriage with the bankrupt, and they refused to change him, the commissioners removed them from their office of assignees; and, on appeal, the court said they had no power to interfere, that the matter was entirely in the discretion of the commissioners, and as it was not shewn there had been any wrongful exercise of discretion, the court refused to reverse the proceeding: *Ex parte Bales* (16 Jur. 459); *Ex parte Molineux* (3 Mont. & Ay. 702).

This is said to be in the ordinary and general exercise of the powers which are vested in the commissioners, there

being no such special authority conferred upon them by the statute.

So, if the assignees refuse to bring an action for the recovery of property alleged to belong to the bankrupt, although it is no reason for removing them, yet the creditor who insists on the expediency of the action, will be allowed to bring the action in the names of the assignees, upon giving them an indemnity against costs: *Ex parte Ryland*, referred to on the argument.

Erskine, C. J., said: "You must shew some reason why the management of the estate should be taken out of the hands of the assignees: would not the best course be for you to bring an action for the money in their names?"

Mr. *Bligh*, for the assignees, objected to this arrangement, the assignees being perfectly willing to bring the action, if they were properly indemnified.

Mr. *Swanston* said the petitioner had no objection to indemnify the assignee, provided he had the conduct of the action.

The court made the order accordingly, that the petitioner, upon entering into the proper indemnity, might bring an action in the name of the assignees, and have free access to the proceedings under the commission, to enable him to prosecute the same.

In *Yewens v. Robinson* the Court of Chancery refused to entertain a bill, at the suit of a creditor against the assignees of an insolvent, charging them with collusion with the trustees of the insolvent, and praying that the trusts might be performed and the defendants restrained from carrying the alleged wrongful compromise into effect, holding that the proper course was to apply to the Insolvent Court to remove the assignee.

Heath v. Chadwick was a decision of the same nature.

In *Ex parte Pooley* the creditors desired the assignee in insolvency to carry an appeal from the Court of Session in Scotland to the House of Lords. The assignee refused to permit his name to be used, and declined to proceed unless

sufficient funds were placed in his hands in the first instance and the appeal was prosecuted by his own solicitors. The Court of Bankruptcy granted a rule *nisi* calling on the assignee in insolvency to shew cause why the assignee of the creditors in Bankruptcy should not be at liberty to commence and prosecute in the name of the assignee in insolvency the appeal, upon giving such indemnity as the court might direct.

Mr. commissioner *Holroyd*, after hearing counsel, said : "I take it to be quite clear that when assignees decline to carry on a particular suit, the creditors are at liberty to continue the proceedings, upon giving indemnity in respect of any liability which may be incurred. Upon the point of jurisdiction the case of *Ex parte Ryland* is an authority. With regard to the question as to who shall have the conduct of its proceedings, I think it only reasonable that those who provide the funds shall have the control"; and the rule was made absolute, upon the indemnity being settled.

Nothing was said at the argument of the direction of the learned judge to the assignee to advise with Mr. Lewis, of Ottawa, and to take his advice as to the management of the estate, and to report what the advice was ; and I only notice it now to say, that the assignee had the sole right to appoint and select his own professional adviser, and he cannot be made to change him, unless upon some reasonable ground, and then only upon the penalty of being himself removed from his office of assignee, in case of refusal: the learned judge could not properly name any professional adviser for the assignee, nor directly interfere with the counsel or solicitor in any way whatever.

As to the general jurisdiction of the judge, I think he had the power to make the order in question, and therefore it is not advisable to interfere with it; for he does not seem to have acted unreasonably, and it is certainly no disadvantage to the estate that the hazard of loss shall be borne by the creditors who indemnify, and all the gain, if any, go to the estate.

In case the amount of security to be given be too small,

the learned judge will no doubt increase it, upon any representation to that effect.

The appeal will, therefore, be dismissed, but, under the circumstances, without costs.

Appeal dismissed, without costs.

LINEY V. ROSE.

Lease for twenty years—Nonpayment of rent during term—Statute of Limitations—Fi. fa. tested in name of puisne judge—Presumption of regularity.

Held, following *Doe d. Davy v. Oxenham*, 7 M. & W. 131, that where in the case of a lease for twenty years, the lessor permits the lessee to continue during the term without payment of rent, the Statute of Limitations does not begin to run against the lessor and those claiming under him until the determination of the lease, but that they may recover in ejectment at any time within twenty years thereafter.

A writ against lands was tested in the name of the then senior puisne judge of the court: *Held*, that the presumption was that the process of the court was regular until the contrary appeared.

This was an action of trespass for breaking and entering the plaintiff's dwelling house, and removing and converting certain of his goods.

The defendant pleaded (1.) That one Paton recovered a judgment in ejectment against Julia Liney, mother of the plaintiff, through whom he claimed the said dwelling house, and took possession on a writ of *hab. fac. poss.*, and that defendant, as the agent and at the command of the said Paton, accompanied the sheriff's bailiff on the execution of the writ aforesaid, to receive and take possession of the premises in question. (2.) That the house was not the plaintiff's house. (3.) That the house was Paton's house, and defendant, as his agent and by his command, broke and entered the said house. (4.) As to the goods and chattels, not guilty. (5.) Said goods not plaintiff's, as alleged.

The plaintiff took issue on these pleas.

The case was tried at the last spring assizes at the city of Kingston, before *J. Wilson, J.*

The evidence given at the trial sufficiently appears by the judgment of the court.

The defendant, amongst other evidence, produced an

exemplification of a judgment recovered by the Bank of British North America against John Counter, and of a writ against lands, under which the premises in question were sold to Paton. This writ was tested in the name of the Hon. *William Henry Draper*, the then senior puisne judge of the court.

Counsel for the plaintiff objected to the judgment and writ on this ground.

A verdict was taken by consent for the plaintiff, subject to the opinion of the court, the damages on the count for the goods being waived.

Sir Henry Smith, Q. C., for the plaintiff, cited *Doe Ausman v. Minthorne*, 3 U. C. 423.

S. Richards, Q. C., contra.

J. WILSON, J., delivered the judgment of the court.

The plaintiff contends that the evidence on his part shews that his father, Patrick Liney, died seised in fee, and that the possession since his death has been in him. That he died on the lot seems to admit of no dispute; but the manner in which he claimed it is very apparent from what Bridget Farrell says: "My uncle told me he had a lease of it from Capt. Earle. He said he had paid money on getting the lease, which was for twenty years, some twenty-five years ago." Speaking of the house she says: "It was a one-story house, a frame building, which was there when he bought it."

Christopher Lee, another witness, says: "He (plaintiff's father) bought this house twenty-five years ago. He gave \$40 for it, I heard. The house is fourteen feet square."

Capt. Earle died on the 18th January, 1841, so that it is probable the lease spoken of was executed not long before he died. Then in 1842 Patrick Liney died in possession; in possession as tenant to Jane Earle, whose estate it was. The evidence further is, that the plaintiff, being Patrick's eldest son, lived there with his mother eight or nine years after his father died and until he married, so that judging

from this evidence and that of the plaintiff's son, whom he called, and who is fifteen years old, we infer the plaintiff married in 1850 and left his mother living there. She died in possession in the spring of 1865. Can the plaintiff, under these circumstances, say the title is in him through his father? We think not. The mother does not appear to have claimed under her son, or maintained the possession for him.

But if she had acquired a possession, the plaintiff was her heir also. We have no evidence of how she claimed, and, in the absence of any proof, the presumption is she remained in as of the same right as her husband, which we have seen was as the lessee of Capt. Earle, on a lease for twenty years. There is no evidence that any rent was ever paid on this lease; for the probabilities are that both Capt. Earle and Patrick Liney died before the first year's rent was due. Now, when did the statute begin to run? On the non-payment of the rent, or at the end of the lease? If the rent had been paid to any one, so that Capt. Earle and his heirs had been disseised of the rent, the statute would begin to run from that time; but no rent was paid, and the statute only ran as against Capt. Earle and those claiming under him from the termination of the lease. The case of *Doe d. Davy v. Oxenham* (7 M. & W. 131) is an authority on the construction of the English statute 3 & 4 Wm. IV. ch. 27, sec. 2, which is the same as our statute, and is in point in the view we take of this case. There it was held, that where a lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years, the lessor is not therefore barred by the statute from recovering the premises in ejectment. The case falls within the latter branch of the 3rd section, which, in the case of an estate in reversion, provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession. The lessor, therefore, may recover in ejectment at any time within twenty years after the determination of the lease. See *Doe d. Johnston v. Liversedge* (11 M. & W. 517), where the same construction of the 3rd section of the act was upheld; and see also 3 Beav. 308. We think, therefore, the plaintiff has failed on the second issue, which goes to the whole case.

We think the defendant has sustained his first and third pleas. He puts in the grant from the crown, tested 8th September, 1804, to Ann Earle, wife of Hugh Earle, for park lot No. 2, in the town of Kingston, of which the lot in question is admitted to be a part. Ann Earle died 17th February, 1818, having issue two daughters; one, who died unmarried, without issue and intestate; and Jane, who married Capt. Miller. She died on the 28th of March, 1863. They came from England, where they were said to have married and lived as man and wife till her father died, and she died.

A deed was put in and proved, Miller and Jane, his wife, of this lot, with other parts of the block No. 2, dated 1st June, 1848, to John Counter, in fee.

An exemplification of a judgment recovered on the 30th October, 1854, in the Court of Queen's Bench, by the Bank of British North America, plaintiffs, and John Counter, defendant, is also put in; also, of *fi. fa.* against goods returned, upon which a *fi. fa.* against lands issued 20th February, 1855, directed and delivered to the sheriff of the united counties of Frontenac, Lennox and Addington on that day: deed, Corbett, sheriff, to Thomas Paton, upon a sale on this writ, dated 15th April, 1856, of the same land which Miller and his wife sold to Counter.

Then there is put in the exemplification of judgment in ejectment, in the Common Pleas,—*Paton v. Julia Liney*, the plaintiff's mother, and *Julia Haley*, commenced on 4th April, 1861, and judgment recovered in 1865.

Then there is the writ of *hab. fac. poss.* issued upon it, and proof that the defendant took possession for Mr. Paton of the land and house, which is the trespass complained of.

It was objected by *Sir Henry Smith* at the trial, that the writ against lands was tested in the name of the Hon. *William H. Draper*, senior puisne judge of the Court of Queen's Bench, and properly so, for the late learned Chief Justice was then absent from the province; but the presumption is that the process of the court is always regular until the contrary appear.

He argued that the other papers are not noted to which

we have referred; but they were all filed at the trial, and are before us.

Supposing, therefore, the plaintiff had made a case *prima facie*, the defendant has sustained the issues on the first and third pleas. The *postea* will be delivered to the defendant on all the issues.

Postea to defendant.

HESKETH V. WARD.

Foreign judgment—Evidence—Imp. Act 14 & 15 Vic. ch. 99, sec. 11—Proof of identity.

Plaintiff produced, as evidence of a judgment against defendant, in the Court of the Exchequer of Pleas, in England, a *certified copy* thereof under the hand of one of the masters of that court, in the form set out below: *Held*, that as the document produced would not be received in England, if the existence of the judgment was in issue, it was not, therefore, under the Imperial act 14 & 15 Vic. ch. 99, s. 11, admissible here, where the judgment was likewise questioned by the plea on the record, but that plaintiff should at least have produced an exemplification under the seal of the court. *Quære*, whether the document referred to is under the seal of the court. It is not, however, an exemplification and would not be here received as such from one of our own courts.

Plaintiffs offered no proof of identity of defendant with the person named in the judgment in question:

Semble, that as defendant had pleaded in confession and avoidance, this, coupled with the identity of name, was some evidence to go to the jury of the identity.

The declaration was upon a judgment, for £338 14s. 7d. stg., equal to £406 9s. 6d. Canadian currency, recovered by the plaintiff against the defendant on the 19th of April, 1861, in the Court of Exchequer in England, and for interest.

The defendant pleaded: 1. Never indebted, to both counts 2. Payment, to first count. 3. Set-off, to first count.

The plaintiff took issue on never indebted and payment, and replied never indebted to the plea of set-off.

The case was tried before the Chief Justice of Upper Canada, at the last spring assizes for the united counties of York and Peel.

The plaintiff's counsel put in a certified copy of a judgment of the Exchequer of Pleas in England. The learned Chief Justice doubted if it properly could be received in evidence; but he admitted it, reserving leave to the defendant to move to enter a nonsuit, if the court should think a certified copy

insufficient to sustain the verdict ; and also on the ground that the identity of the defendant was not proved.

A verdict was, therefore, rendered for the plaintiff, and damages assessed at £509 6s. 8d.

In the following Easter term *D. McMichael* obtained a rule accordingly.

In Trinity term last *Read*, Q. C., shewed cause :—

The document in question is an exemplification : the marks or impressions on it are good seals. He referred to the Consol. Stats. of Canada, c. 80 ; Imp. Stat. 14 & 15 Vic. 99, ss. 79, 11, 14, 19 ; last ed. of Starkie on Ev. 257 ; *Tooker v. Duke of Beaufort*, Sayer 297 ; Bac. Abr. "Evidences," L. ; *Pitton v. Walter*, Str. 162 ; *Smith v. McGowan*, 11 U. C. Q. B. 399 ; *Woodruff v. Walling* 12 U. C. Q. B. 501 ; *Hamilton v. Dennis*, 12 Grant 328 ; *Tomkins v. Davis*, 6 U. C. C. P. 408 ; Taylor on Ev. 4th ed. 1311 ; and as to identity, *ibid.* 1651, 1554.

McMichael, contra :—

By our statute, if an exemplification be produced, the seal need not be proved. An exemplification is quite distinct from an office or a certified copy : Taylor on Ev. 4th ed. 1296 ; Rastell's Entries, 331. An office copy is only admissible without proof in the same court in which the original is, and in the same cause ; but if it be produced either in another court, or even in the same court in another cause, it must at common law be proved to be a correct copy : Taylor on Ev. 1298-9.

Sec. 11 above referred to does not permit an office copy of an English judgment to be used in this country.

There is no seal at all : the document does not profess to be sealed, but only to give copies of seals which may be in the original.

It is not the court which speaks by this document, as is the case in an exemplification ; it is the officer only, and he says it is a certified copy.

There is, also, no identification of this defendant with the person called James Ward in the instrument : the mere name is not alone sufficient.

A. WILSON, J., delivered the judgment of the court.

Section 11 of the imperial statute referred to provides, "That every document, which by any law now in force or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in England, or Wales, or Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies by law, or by consent of parties, authority to hear, receive and examine evidence, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

The provincial act c. 80, s. 1, provides differently; for it enacts that an exemplification of such a document as the one in question, if under the seal of the court, may be proved in any suit, action or proceeding in Upper Canada, without any proof of the authenticity of the seal, or other proof whatever, in the same manner as any judgment, decree or similar judicial proceeding of any of the superior courts of common law or equity in Upper Canada may be proved by an exemplification in any judicial or other proceeding in the last mentioned courts respectively.

We must admit a document if receivable in evidence under the imperial statute, although it may not be an exemplification under the seal of the court according to the provincial act.

The question then is, is the document produced an admissible document in evidence in any court of justice in England, Wales or Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same? If it be so, then it is admissible in evidence here to the same extent and for the same purposes.

The document is in this form:—

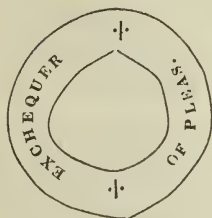
"IN THE EXCHEQUER OF PLEAS:

Roll 2; Easter, 1861.

The twenty-ninth day of January, in the year of our Lord one thousand eight hundred and sixty-one.

LANCASHIRE, SOUTHERN } William Hesketh, by William
DIVISION, To wit: } Hunt, his attorney, and James
Ward, &c., &c.

[Setting out the proceedings, and concluding:]



Which said moneys amount in the whole to three hundred and thirty-eight pounds fourteen shillings and seven pence.

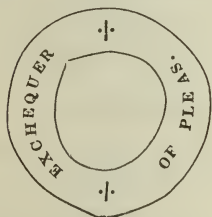
I certify that the foregoing is a true copy of a judgment now in the custody of the Master of the Court of Exchequer.

Dated this 2nd Oct., 1865.

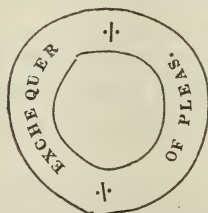
Judgment signed the 19th day of April, in the year of our Lord one thousand eight hundred and sixty-one.

GEORGE POLLOCK,

One of the said Masters."



The document was endorsed,
"In the Exchequer of Pleas,
HESKETH }
v. } *Office copy Roll.*
WARD.



WM. HUNT,

4 Gray's Inn Square."

The document in England would not be admissible in evidence upon the issue of *nul tiel* record. The original must be produced, if the trial take place in the same court

where the record is ; and an exemplification under the great seal must be procured, if the trial take place in a different court. If an action be brought in a county court in England on a judgment of one of the superior courts, a copy of the judgment is not admissible on a plea denying it, but there must be an exemplification produced : *Winsor v. Dunford* (12 Q. B. 603). In Taylor on Evidence (4th ed. s. 1381) it is said : " When the existence or contents of the record are not directly in issue it may, at common law, be always proved by the same kind of exemplification ;" that is, under the seal of the court.

If this document be not admissible in any court of justice in England, Wales, or Ireland, in an action upon it in which its existence or contents are actually in issue, then it is not admissible here either, because such documents are only to be admitted to the same extent and for the same purposes in the colony that they are receivable in evidence for in England, Wales, or Ireland.

The plea of never indebted has not been objected to, as it might have been ; for the defendant is not at liberty to contest the judgment on any ground which he might have taken by way of defence in the first instance : *Bank of Australasia v. Nias* (16 Q. B. 717) ; *De Corse Brissac v. Rathbone* (6 H. N. 301) ; but being pleaded it puts in issue the existence of the judgment as well as the liability upon it.

This being so, we think the judgment could not have been proved by this document in the old country, and cannot therefore be proved by it here.

The plaintiff must at least have an exemplification under the seal of the court, in which the judgment is entered, to sustain his action, in the event of the judgment being controverted.

We are not prepared to say this document is not under the seal of the court : the ink impressions upon it may constitute a seal : *Regina v. The Inhabitants of St. Paul Covent Garden* (7 Q. B. 232) ; *Hamilton v. Dennis* (12 Grant 328) ; *Foster v. Geddes* (12 U. C. Q. B. 239). But we are of opinion it is not an exemplification. The form of that proceeding is like other writs running in the name of

the Sovereign, and tested, when under the seal of the court, in the name of the chief justice of the court. Such an instrument as this we could not receive as an exemplification from our own court. It does not profess to be more than an office copy, or certified copy, and we cannot rate it at anything more.

As to the want of proof of the identity of the defendant with the person who is named in the judgment, the identity of name, though not a great deal, is something here, because the liability is not sought to be imposed by reason of any writing of the defendant which he might meet by disproof; but it is a case where he is sought to be made liable upon a document of which no kind of proof was given. And it appears the defendant has pleaded pleas in confession and avoidance, and upon the whole these may be some evidence to go to the jury of the identity: *Sewell v. Evans* (4 Q. B. 626); and see *Burnand v. Nerot* (1 C. & P. 578).

There having been a failure to prove the debt or judgment, the rule should be made absolute for a nonsuit; but as the plaintiff desires a new trial, the rule will go for a new trial, on payment of costs within four weeks.

Rule absolute for new trial, on payment of costs.

ROSS V. THE CORPORATION OF THE VILLAGE OF PORTSMOUTH.

Navigable water—Right of Crown to lay out highway—Its right to grant portion of lake not navigable.

A grant of land will carry land covered with water.

The evidence shewed that the portion of the grant in dispute, at extraordinary periods when the water of the lake was pressed up at this particular part of it by strong winds, admitted of scows passing over it, but that the water was not then more than four or five feet deep, and that at ordinary times it was quite shallow and fordable: *Held*, not navigable water.

The property in question formed part of the lake, though not navigable: the Crown surveyed a part for the line of road, which was then under water, the effect of which was that the property in question, which lay to the north of this intended road, would, if the road were made, become a mere stagnant pond:

Held, that the Crown had the right to lay out the highway where it did, and that, therefore, it could grant the portion to the north of it, which would be thus excluded from the lake; and that it could do this without the aid of 23 Vic. ch. 2, sec. 35.

Ejectment for a portion of that part of lot No. 19 in the

first concession of the township of Kingston, lying between the old travelled road and the original allowance for road in front of the said lot, now called Front street, containing one acre and fifty-three one-hundredths of an acre, more or less, commencing, &c.

The plaintiff claimed title under a deed, dated 28th July, 1865, from James C. Gardner and wife to him, and also by deed from Gardner to Charles W. Brennan, and by deed from Brennan to the late Douglas Prentiss, and by deed from the heirs at law of Prentiss to the plaintiff.

The defendants, besides denying the plaintiff's title, claimed title in themselves under a grant from the crown.

The cause was tried at the last spring assizes for the county of Frontenac, held before *J. Wilson, J.*, when a verdict was found for the plaintiff.

The plaintiff put in a copy of a patent, dated the 1st of May, 1798, to Michael Dederick, of 200 acres more or less, being composed of lot No. 19, front concession of the township of Kingston, "beginning at a post in front of the front concession, marked 19-20; thence north 105 chains 27 links, more or less, to the second concession; thence west 19 chains; thence south to the front; thence easterly along the front to the place of beginning."

Simeon Morrell said he worked on lot No. 19 in the year 1816: he knew the patentee, who died in 1822: the first concession was generally called the *front*: he bought the south half of this lot and the broken front with John Ellerbeck: he was then living on it with Dederick: the road then ran round the bay and entered the concession road at No. 18: there was a pond-hole where Brash's blacksmith's shop now is: where the concession road was he had waded many a time: ducks used to be there: the bottom was sandy and shallow: he built his tannery next to the blacksmith's shop in 1819: he filled up where the water was and built his vats there: he always asserted title to the concession line: he left for London in 1829, and during that time there was no change in the boundary of the bay: Ellerbeck sold the south-east quarter of the lot to James

Gardner, who built, in 1818 or 1819, a brick house, which was then on the road: in 1832 the bay was not filled up: in front of the penitentiary there was a high rock in the concession, and by removing it the bay was filled up with the stuff from it: the original post between 19 and 20 stood in the roots of an oak on the north side of the road, and the other post between 18 and 19 stood on the north side of the road also: Col. Foster owned the broken front on the south of the concession: the bay was on the east half of the lot, for when Ellerbeck and the witness divided the division post was on his (witness') land: the travelled road struck in near to the post marked 18-19: Gardner's house fronted the road and was to the north of it: to land tan bark the witness had to build a wharf south of the concession: boats could not come to the concession: he sold the broken front of his part of the lot, and Ellerbeck sold his part of it also: Dederick claimed to the waters of the bay.

Calvin Day was born in the 1st concession of Kingston. He recollected 50 years back. "We called the 1st concession the *front*." Recollected seeing posts on the north side of the road on the front concession: one as long as he could remember.

James C. Gardner, son and heir-at-law of the Gardner who bought from Morrell. Witness inherited the south-east quarter. He always considered the bay north of the concession to be part of his lot: all the bay north of the concession had been filled up: he claimed it as his own.

Thomas Nash, P. L. S., said he was employed to survey the south-east corner of this lot, and made a plan of it. A part of the tannery spoken of by Morrell was within the limits of the patent to the defendants. As the description of the lot began at a post and ran to the front, he ran the lot as square. In dividing the lot into north and south halves he would divide the lot at an equal distance from each concession. He made a survey of the piece now granted to the defendants. He surveyed it as part of the bay. He surveyed it for the defendants, and he told them he thought it was covered by the original patent.

This was the case for the plaintiff.

For the defence, copies of descriptions of grants in the first and front concession from lots 1 to 25, inclusive, were put in, and also the patent to defendants.

Thomas Davis said he had sailed into the harbor with a scow carrying 40 cords of wood and drawing 4 or 5 feet of water : went up in front of the brick house to within 24 or 25 feet of the shore : this was 24 years ago : waggons and carts came out to the scow and took the wood off her.

George McLeod said the road along the concession was made under the authority of the District Council after 1841. Before the long pier was built he had seen in high water schooners come up after a wind had blown from the southwest. Gardner's step-father built a scow there. The bay north of the road was chiefly filled in. The council got stone to fill across. The water was 4 or 5 feet deep in places. The penitentiary authorities filled-in the bay to prevent the water from stagnating.

The parties then consented that a verdict should be entered for the plaintiff, with leave to the defendants to move to enter a nonsuit or a verdict for them according as the court should think that the grant, under which the plaintiff claimed, or the grant to the defendants, was entitled to prevail ; and that the court should be at liberty to draw inferences of fact as a jury might.

In Easter term last *A. M. Clark*, for the defendants, obtained a rule calling on the plaintiff to shew cause why a nonsuit or a verdict should not be entered for the defendants, because the patent under which the plaintiff claimed did not cover the premises in question, and because the premises in question were at the time of the issuing of the original patent covered by navigable waters, and did not pass.

In Trinity term last *Sir H. Smith*, Q. C., shewed cause :

The U. C. Consol. Stats. ch. 93 [see also Consol. Stats. for Canada, ch. 77] secs. 14-15, made the original survey, and the posts or monuments then planted unalterable. The

place of the posts in front was clearly proved. All the land by sec. 15 which lay between a direct line drawn between these posts composed a part of the lot, unless the contrary plainly appeared. In this case, the last course, "thence easterly along the front to the place of beginning," shewed that by *the front* the concession line was intended; because in this very grant the point of commencement was "at a post *in front of the front concession*, marked," &c.; and because the first or front concession was similarly referred to in by far the greater number of the 32 different descriptions of lots which had been put in; and it would have been quite as easy to have declared that the last course should be along the waters of the lake or bay, if it had been intended to make them the governing boundary in place of the usual concessional line.

The evidence shewed that the bay in question was never navigable in the proper sense of the term, but that after a strong blow from the south-west the water was raised for a time 4 or 5 feet, and that the ordinary state of the water was that it was too shallow for navigation, and so shallow that the bay could be waded over conveniently: it was, therefore, more reasonable to estimate this marshy bit of land as part of the lot than to except it as part of the lake: Bac. Abr. "Grant"; Crabbe's Real Property, 1 vol. 67; *Clarke v. Bonnycastle*, 3 O. S. 528.

S. Richards, Q. C., contra:—

The indentation on lot No. 19 was a part of the lake when the grant was made in 1798: there is evidence, also, that it was navigable, as far as that may be material: it was at any rate land covered with water, and there is no intention in the grant to pass any such kind of land: *The Queen v. Myers*, 3 U. C. C. P. 305; Phear on Rights of Water, 53-54.

The patent should be construed most favorably for the crown: Ch. Prerog. 391, 2-4-7; *Doe d. Malloch v. The Ordnance Commissioners*, 3 U. C. Q. B. 387.

The expression, "beginning at a post in front of the front concession," does not in all cases mean that the beginning

is to be on the actual concession line; for in many of the descriptions of lots in this concession the posts on the lake are described as being on the concession line. The third course in the plaintiff's patent, *to the front*, means *to the lake*, rather than to the front of the concession; and then the last course, "easterly along the front to the place of beginning," means along the water's edge.

The wording of the original sections (14 and 15), above referred to, was different before the consolidation: see Public Acts of U. C. p. 262, sec. 2.

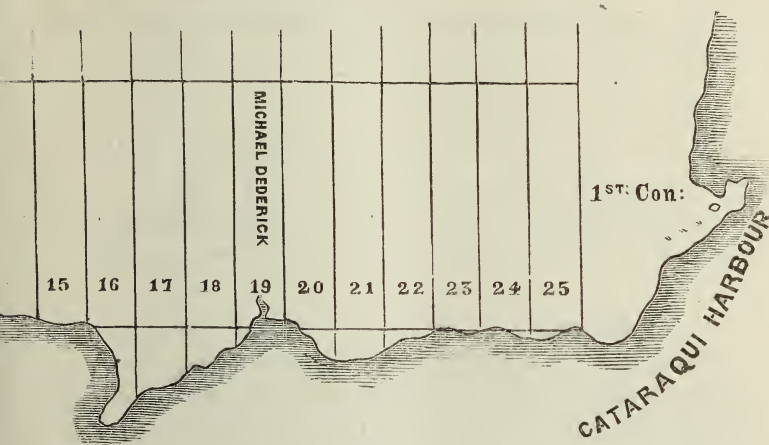
By the Public Acts of U. C. 540-1, and Consol. Stats. U. C. ch. 3, secs. 5-6-7-8, certain lands lying on water are specially provided for.

The 23 Vic. ch. 2, sec. 35, confers power on the crown *now* to make such a grant as this of land covered by the waters of the lake. (He referred to *Doe d. Stuart v. Forsyth*, 1 U. C. Q. B. 324, as a decision upon this same concession.)

A. WILSON, J., delivered the judgment of the court.

The defendants contended at the trial, and they put in a plan from the crown lands department, shewing that the place described as the site of the post between 19-20 was not dry land at the time of the original survey, and that the waters of the lake forming the indentation, instead of being confined to a place considerably to the west of the alleged post 19-20, as the plaintiff asserted, extended from about the centre of lot No. 19 to a considerable distance easterly beyond the corner post and encroached upon No. 20, so that the plaintiff had not in fact two corner posts at the front of his lot on the concession line, but only one on the concession line at the west and another on the water's edge at the east, a good deal to the north of the concession line; and therefore that the last course on the plaintiff's grant, "and thence easterly along the front to the place of beginning," meant necessarily along the water's edge as the front, as there was no other front in the case of this lot to which such an expression could be applicable.

It is important that this point should have been correctly ascertained. The defendant's plan put in is certified as follows:—



“Copy of part of a plan of township No. 1 [now Kingston] in the District of Mecklenburg, surveyed by John Collins, D. S. C., in the year 1783.

“I certify that this is a true copy of the plan from which the descriptions for patent of the lots on the first and front concession of Kingston appear to have been prepared, or were prepared.

ANDREW RUSSELL,
Assistant Commissioner.

Department of Crown Lands,
Ottawa, March, 1866.

Examined and certified a true copy.

ANDREW RUSSELL,
Assistant Commissioner.”

The plaintiff's plan is certified as follows:—

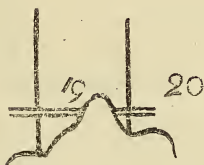
“Kingston: Scale forty chains to an inch. By A. Aitkin, D. P. S., 1797.

Crown Lands Department,

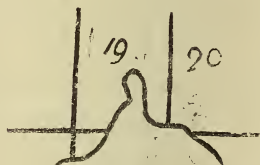
Montreal, October, 1866. True copy.

D. B. PAPINEAU, C. C. L.”

The land is represented on the respective plans as follows:—



Plaintiff's Plan.



Defendants' Plan.

The witnesses testify to the fact of there having been dry land at a very early date on the line of the concession road at the point between 19 and 20, and that an original post stood at such point. The description in the patent of 1798 supports this evidence, for it begins “at a post in front on the front concession marked 19-20; thence north 105 chains 27 links more or less to the second concession,” &c.; which, with the width of 19 chains, is just precisely the full length of side-line necessary to make the complement of 200 acres. We think, then, that the plaintiff has sustained his contention of there having been dry land and a post planted on the concession line at the east, as well as the west angle of lot No. 19.

There is nothing to have prevented the Crown from granting to Dederick a direct line on the front of his lot from the west to the east angle along the concession line, excepting the fact that there was some portion of the front of the lot broken by the indentation caused by the water of the lake; and it is said by the defendants that such portion, being so covered by water, was a part of the lake and could not be granted by the Crown: secondly, if it could be granted, it was not in truth granted, as no part of the property mentioned is described as land covered by

water; and thirdly, that this part could be and was navigated upon, and, being navigable, it was beyond the power of the crown to transfer it.

The grant of land will carry land covered with water; and there is nothing here from which the jury or the court could infer that the parcel of land so covered, if it were not navigable, was not intended to pass by the grant, merely because it was covered with water. It was in measurement a part of this lot 19, and the presumption is that it did pass and was intended to pass, unless the contrary be made to appear. We think it did pass by the grant, if it could be granted; and we think the evidence does not shew it to have been navigable water. At most it was so for very inferior vessels, such as scows, and only at extraordinary periods when the water of the lake was pressed up at this particular part by strong westerly winds, and then there were not more than 4 or 5 feet of water upon it. At ordinary times it was quite shallow and could be waded across easily. Now, these extraordinary high marks of the lake are not the marks which determine what is the shore of the lake any more than they determine what is the shore of the sea; and, by analogy, we think they do not determine what is navigable water either: *Lowe v. Govett* (3 B. & Ad. 863; *The Attorney General v. Chambers* (18 Jur. 779).

The only remaining question is, as this parcel was in fact a part of the lake, though not navigable, was it in the power of the crown to grant it?

It will be seen that the crown surveyed a part for the line of road which was then under water, and that the property now in question, lying still more to the north than the intended road, would, if the road were made, become a mere stagnant pond, quite useless for all public purposes and noxious to health. Now, we are not at all disposed to think that the crown was incapacitated from forming a public highway along or across a small unimportant encroachment of the lake upon the land. Such a road was manifestly for the public advantage, and, as was said by the court in *Reg. v. Betts* (16 Q. B. 1022), "the true question is,

whether a damage occurs to the navigation in the particular locality. * * * An indictment would not lie for merely erecting piers in a navigable river : it must be laid *ad commune nocumentum* ; and whether it was so or not must be decided by the jury."

And it appears that the very road or concession road which the crown intended to make was afterwards in fact constructed by the District Municipal Council, who had express legislative jurisdiction in such cases.

The crown, therefore, had either the right to lay out and provide for the formation of this line of highway, or it had not : if it had, we think it follows that it could grant all to the north of it which would be thus excluded from the lake, which would then become a mere useless enclosed pond or marsh ; if it had not, there was no power to build this road, and there was no power to fill up the pond to the north of it, and no power to grant the pond to any one else.

But the defendants say the Crown could grant it, because it has been granted to themselves. But the enquiry is, when, or how, or why, did the crown acquire this right ? It is either all a usurpation against the public rights from the survey and formation of the road downward, in which case the defendants can set up no claim, or the survey and formation of the road were rightful, in which case the grant to Dederick was rightful.

We adopt this latter view. The Crown could grant the soil and freehold in this land covered with water unquestionably, subject to the public easement. But what easement or advantage did this shallow bit of water afford to the public ? and what deprivation has it been to any one ? The grant does not require the aid of the 23 Vic. ch. 2, sec. 35, to support it.

We think the rule must be discharged.

Rule discharged.

REGINA V. WILLIAM SLAVIN.

Conviction under Consol. Stat. U. C. ch. 98—New trial refused—Admissions and declarations of prisoner—Evidence of intent, and of being in arms with intent, to levy war—Import of the expression “in arms,” under Con. Stats. U. C., ch. 98—Imp. Act 11 & 12 Vic., ch. 12—Duty of court as to evidence on application for new trials in criminal cases—Surprise—New trials, when inexpedient to grant rules nisi for.

The prisoner, having been indicted under Consol. Stats. U. C., ch. 98, (3 Vic., ch. 12), as a citizen of the United States of America, was convicted of having, as such, joined himself to divers other evil disposed persons, and having been unlawfully and feloniously in arms against the Queen within Upper Canada, with intent to levy war against her Majesty. It was sworn that the prisoner had said he was an American citizen and had been in the American army, and there was no evidence offered to contradict this :

REPORT OF CASES

IN THE

COURT OF COMMON PLEAS.

MICHAELMAS TERM, 30 VICTORIA, 1866.

Present:

THE HON. WILLIAM BUELL RICHARDS, C.J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

that he is present and concerned with those who are armed, even though he do not carry arms himself.

Whenever a joint participation in an enterprise is shewn, any act done in furtherance of the common design is evidence against all who were at any time concerned in it. In this case evidence was admitted against the prisoner of the engagement above alluded to, although the same took place several hours after his arrest :

Held, that the evidence had been properly received, as shewing to some extent that the engagement in question had been contemplated by the parties while prisoner was with them before his arrest.

The Imperial statute, 11 & 12 Vic., ch. 12, does not override 3 Vic., ch. 12, of this province, for the latter is re-enacted by the consolidation of the statutes, which took place in 1859.

As has been laid down in several previous cases, it is not the duty of the court, under the statute respecting new trials in criminal cases, to scan the evidence with a view to saying whether the jury might, or might not,

fairly considering it, have acquitted the prisoner : it is sufficient for the court to say that there was evidence to warrant a conviction.

It is no ground of surprise that a prisoner "had no knowledge of the evidence to be produced against him ;" for no one is obliged, by pleading or otherwise, to disclose the evidence by which his case is to be supported ; it is sufficient that the party is fully apprised of the case or charge proposed to be proved against him, which he must, being so informed, prepare himself to repel.

Regina v. Finkle, 15 C. P. 453, followed as to the inexpediency of granting rules *nisi* for new trials in criminal cases, where there is no probability of their being made absolute.

The prisoner, was tried at the last assizes for the United Counties of York and Peel, before *J. Wilson, J.*, and convicted on the second count of the indictment, for that he, "being a citizen of a certain state, to wit, the United States of America, at peace with her Majesty, the Queen, heretofore, to wit, on the second day of June, in the year of our Lord one thousand eight hundred and sixty-six, and while the said foreign state was so at peace with her Majesty, with force and arms, in the county of Welland, in that part of the province called and being Upper Canada, having before that time joined himself to, and being then and there joined to, divers other evil disposed persons, to the jurors aforesaid unknown, was unlawfully and feloniously in arms against our said lady, the Queen, contrary to the form of the statute in such case made and provided, and against the peace of our lady, the Queen, her Crown and dignity."

It was proved that the prisoner was a citizen of the United States, and had crossed from Buffalo to Fort Erie in a skiff, on Thursday the 31st of May last, between six and seven in the afternoon, and that a man he did not know paid his passage over ; that on Saturday the 2nd of June, about four o'clock in the morning, he was about a mile below "Newbiggin's," which was about a mile lower down than where the main body had crossed, with a rifle and bayonet similar to those which the Fenians then had, and which he said he had picked up on the road. He said he was tired and asked for a place to lie down ; that he had been out all the previous night ; that he had been with the Fenians, but he was not one of them ; and that he had left them at a place which

was said to be about three miles from Limeridge ; and that he had lain by the fence till the main body had passed, and then returned. The other general facts of the case were that a large body of armed men, who were spoken of by the witnesses as Fenians, crossed over from Buffalo to Fort Erie on the morning of the 1st of June, and marched in the course of that night and the next morning to Limeridge, where an encounter took place between this body on the one side, and the Canadian volunteers, who had been called out to repel this descent and outrage, on the other, and that many persons were killed and wounded in the engagement on both sides. The volunteers were in uniform and proper martial array. It was a contest between two organized forces, her Majesty's forces on the one side, and these invaders on the other.

On this evidence the prisoner was convicted.

K. McKenzie, Q.C., applied for a rule *nisi*, calling on the Attorney-General to shew cause why the verdict against the prisoner should not be set aside, and a new trial granted, for causes set out at considerable length in the motion paper, but which may be fully stated as follows :—That there was no legal evidence at the trial—1st. That the prisoner was a citizen of the United States, of America, as alleged in the indictment. 2nd. That the prisoner intended to levy war against the Queen. 3rd. That he was in arms in Upper Canada with intent to levy war. He moved on the further ground, of the reception of improper evidence, on behalf of the Crown, of a collision having taken place between her Majesty's volunteer troops and the armed body of persons which crossed from Buffalo, and of the circumstances connected therewith, while such matters occurred in the absence of the prisoner and several hours after he was arrested. And lastly, because the Imperial act, 11th and 12th Vic., ch. 12, provided for offences against the Crown similar to those alleged against the prisoner, and controlled the Provincial act under which the prisoner was tried, and which was passed previously to the Imperial act.

On moving the rule the learned counsel referred to the following authorities : *Frost's case*, 9 C. & P., 129 ; *Arch. Cr. Pl.* 629 ; *McBride v. Bailey*, 6 C. P. 9 ; *Regina v. Scaife*, 17 Q. B. 238 ; *Benway v. Case*, 18 U. C. 476.

A. WILSON, J., delivered the judgment of the court.

The statute under which this prosecution has been carried on is ch. 98 of the Consolidated Statutes for Upper Canada. The act so consolidated was originally passed in the 3rd year of her Majesty's reign, but the effect of the revision, classification and consolidation, by ch. 1, of the Consolidated Statutes, intituled "An Act respecting the Consolidated Statutes for Upper Canada," passed on the 4th of May, 1859, was "to all intents as though the same [the Consolidated Statutes] were expressly embodied in and enacted by this act to come into force and have effect on, from and after such day."

The first section of ch. 98 declares "that in case any person, being a citizen or subject of any foreign state or country, at peace with her Majesty, be or continues in arms against her Majesty within Upper Canada, or commits any act of hostility therein, or enters Upper Canada with design or intent to levy war against her Majesty, or to commit any felony therein, for which any person would by the laws of Upper Canada be liable to suffer death, then the Governor may order the assembling of a militia general court martial, &c." And the third section of the act (as amended by the 30th Vic., ch. 4) provides, that every such person may, nevertheless, "be prosecuted and tried before any court of Oyer and Terminer and general Jail Delivery in and for any county in Upper Canada, in the same manner as if the offence had been committed in such county, and upon conviction shall suffer death as a felon." The count seems to have been drawn from the second section of the statute, which applies only to subjects, and from the first section, which applies only to foreigners, compounded together. Such a count has entailed much more proof on the Crown

than need have been assumed ; but still, when proved, there is left a distinct statutable offence stated against the prisoner, of being in arms against the Queen.

As to the first objection contained in the rule. It was sworn that the prisoner said he was an American citizen, a native of New York, and that he had been in the American army, and there was no evidence whatever in contradiction of this. The admissions and declarations of the prisoner were, unquestionably, evidence against him.

As to the second objection. It was shewn that several hundreds of armed men came from the shore of the United States and landed in this province at and about Fort Erie very shortly after the prisoner himself came from the same place ; that the prisoner was with them all the night of the first of June ; and that he was early on the morning of the 2nd of June seen carrying a rifle and bayonet similar to those which the above armed men had, and altogether different from those that were used by any of Her Majesty's troops, and which he said he had found upon the road. It was also shewn that this armed body was organized ; that it encamped and marched in military order ; that it took prisoners and fought Her Majesty's troops upon that day, and killed and wounded several of them. This was evidence more or less against the prisoner, and although there was evidence also very favorable for him, it was nevertheless impossible to say there was no evidence that he intended to levy war. We do not discuss the ground taken by Mr. McKenzie, and argued so strongly upon this point, that this intent was not to be collected from any act or acts whatever : not by being armed ; nor by marching in military array ; nor by taking prisoners ; nor by fighting Her Majesty's troops ; nor even by wounding and killing them ; for it can scarcely be necessary, we should say, that *bellum percutsum* is some evidence of an intent to levy war ; and, perhaps, it might justly be considered as the most unequivocal and convincing evidence of such an intent. It was argued that this intent could not be gathered by any other means than by the passing of a resolution, or by some verbal or written declaration,

plainly expressing that the purpose was to levy war. We say nothing further on the point.

As to the third objection. The evidence shews as a fact that the prisoner was in arms at four o'clock on the morning of the 2nd of June, and that he had been with the foreign armed body during the night before; that is, that he was with the same armed body all night which fought Her Majesty's troops a few hours afterwards. It is true he said he had found the rifle and bayonet that morning on the road; and it is true there was evidence that he was not actually armed the night before; but the jury had to pass upon this conflict of testimony. It is quite sufficient for us that we are not able to say there was no evidence that the prisoner was in arms in Upper Canada in the manner stated in the indictment. This point was argued as if it were necessary the prisoner should have had arms actually upon his person at the time in question. We do not adopt this view of the statute. We think that every artilleryman in charge of a gun, though carrying no arms upon his person, may properly be said to be in arms; that two persons, having only one rifle between them, may, although one of them alone is carrying it, be said to be in arms; that an officer commanding a number of men who are armed, may, although he carry no arms himself, be considered to be in arms. All who are concerned in and are present at the commission of an offence are principals, and are alike culpable in law.

As to the fourth objection. We think that whenever a joint participation in an enterprise is shewn, any act done in furtherance of the common design is evidence against all who were at any time concerned in it, and therefore the fighting which took place on the day that the prisoner was arrested, and after his arrest, was some evidence that such fighting was contemplated by the parties while the prisoner was with them before his arrest. In *Frost's* case (9 C. & P. 150), *Tindal*, C. J., said, "It may also be shown by acts done afterwards what the common design was."

The last objection does not exist in fact; for the Provincial act of 1840 was by the consolidation in 1859 reenacted, and

is therefore later in point of time than the Imperial statute referred to. The question as to any conflict between them does not therefore arise. We do not profess to have scanned the evidence with the view of saying whether the jury might or might not, fairly considering it, have rendered a verdict of acquittal. We have already declared on several occasions that this is not our province under the statute: it is sufficient for us to say that there was evidence which warranted their finding, and it is quite impossible for us to say, in the terms of the motion, that there there was no evidence against the prisoner.

A new trial is then asked for upon the grounds disclosed in the affidavits filed. One of the affidavits, which is made by Mr. Fenton of this place, relates to his searching and enquiring for an order of the executive council under the statute of last session, authorizing the trial of the prisoner to be held, which is of no consequence now, as this ground of motion has been abandoned by the prisoner's counsel. The only other affidavit is the one which is made by the prisoner himself, and it is in these words, so far as is material to the present question: "That I had no knowledge of the nature of the evidence to be produced against me, and by reason thereof was taken by surprise. I say that I am innocent of the charges upon which I was indicted, and particularly the charge of being in arms against Her Majesty the Queen. I am informed and believe that every effort was made by my attorney to procure the attendance of Mr. McLeod, a most material witness for me, at my said trial, but without avail. If a new trial be granted by this honorable court I shall be able to secure the attendance of said McLeod, as well as other witnesses who have offered to give material evidence in my behalf, and I verily believe that I shall be able to show that I had nothing whatever to do with the invasion of this province by the Fenians in the month of June last."

That the prisoner "had no knowledge of the evidence to be produced against him" is no ground of surprise, for no one is obliged, by pleading or otherwise, to disclose

the evidence by which his case is to be supported: it is sufficient that the party is fully apprised of the case or charge which it is proposed to prove against him, and he must then, being so informed, prepare himself to repel it. We cannot conceive a simpler case than the present to be answered, if it be capable of being answered, and accordingly all the evidence which was given by the prisoner was directly applicable to the point of his defence; but the jury were not satisfied with it. No false swearing or exaggeration is imputed to the Crown witnesses, and no kind of ground is shown upon which we could properly interfere to avoid this verdict. If a new trial were to be granted upon such an affidavit no verdict could ever stand, and the rule of law would practically be that every case must be tried at least twice before it should be considered to be final.

Before concluding our observations we wish to refer to some passages of the charge to the jury of Chief Justice *Tindal* on the trial of Frost, a charge which has been described as "the model and exemplar of judicial discrimination and impartiality," and which places upon a true and just footing the kind of evidence which may be admitted and relied upon for the purpose of proving the intent with which a party has done, or has attempted to do, particular acts charged against him, and which unanswerably dispose of the argument of the prisoner's counsel, that no *act* whatever, however violent or hostile, no battle or fighting with the Queen's troops, however serious, could be used as evidence of an intent to levy war. We quote from the short-hand notes of the trial taken by Joseph and Thomas Gurney, published in London in 1840. At page 689 the Chief Justice said: "It is not, however, an unreasonable thing, and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake, and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearance with perfect innocence. Therefore the learned counsel of the

prisoner, although he entered his protest against his being necessarily required to make such a statement, proceeds to say, that the case of the prisoner at the bar was one that was perfectly innocent, that is, perfectly innocent so far as regards the crime of high treason. He stated that it was never intended by the prisoner either to take the town, or to attack the military, which latter act was purely accidental; that all that was intended was, to make a demonstration to the magistracy of Newport and the county of the strength of those persons who were called Chartists, for the single purpose and design of inducing the magistrates either to procure the liberation of one Vincent, and three other persons, who had been convicted of some political offence, and were then confined in Monmouth jail, or, at all events, to procure a mitigation in their mode of treatment whilst under imprisonment." At page 695 he says: "If there had been no other evidence against the prisoner at the bar except the fact of the conflict that took place between the soldiers and the mob, who were led on by him, certainly it would have been very important to see whether they had any knowledge that there were soldiers there at all, and to show that they had an object perfectly distinct from any wish to attack the soldiers; that they meant nothing but to rescue certain prisoners who were confined in the gaol. But this is not the whole of the evidence that will be before you on this point; because you must take into your consideration, when you are determining upon the intent and purpose of the prisoner at the bar, not only what took place at the immediate moment of the conflict at the Westgate Inn, but also the information which he had received just before from the witness Coles, that some of the soldiers had gone to the Westgate Inn; the conversation in Frost's presence on that occasion; and, still further, the general evidence relating to the bringing down so large a body of armed men into the town. This must have been done with some intent or other: what that was you will have to determine upon the whole of the case." At page 748 it is stated, that the mere demand by an armed mob that Her Majesty's troops, whilst they

were under arms and acting in preservation of the peace, should surrender themselves as prisoners, was not only an act of a very hostile nature, but it amounted to high treason; and at page 764 it is stated that "a premeditated design to attack the soldiers" will constitute high treason. There are also many other passages in this admirable charge, containing a clear exposition on this important part of the law, which quite warrant us in forming the opinion we have expressed, but which in no instance countenance the doctrine which was put forward by the prisoner's counsel. In the *Queen v. Finkle* (15 C. P. 453) the inexpediency of granting rules *nisi* in criminal cases, where there was no probability of their being made absolute, was referred to, and acting on the views there expressed, we think, we ought to refuse the rule. The rule will therefore be refused, and the conviction is affirmed.

Rule refused. (a)

THE COMMERCIAL BANK OF CANADA V. COTTON ET AL.

Banks.—Interest.—Con. Stats. C. ch. 58, sec. 9—29 & 30 Vic. ch. 10, sec. 5—Pleading.

To an action by the plaintiffs, a banking corporation, against defendants on a promissory note, defendants in effect pleaded that the note was void under Con. Stats. C. ch. 58, sec. 9, in consequence of the taking by plaintiffs of more than seven per cent. interest from defendants: *Held*, on demurrer, plea bad; for that the effect of the 29 & 30 Vic. ch. 10, sec. 5, was not merely to relieve banking corporations from the pecuniary penalty mentioned in the act referred to, but to save the security given for the moneys loaned from the forfeiture under that statute.

Declaration, on a promissory note for \$500, made by defendant Cotton, endorsed by defendant Taylor, payable at Hamilton.

Plea.—That defendant Taylor endorsed the note in blank, and that afterwards defendant Cotton corruptly, &c., agreed that plaintiffs should discount said note for him, and charge

(a) At the conclusion of this judgment the prisoner's counsel applied for leave to appeal, but the Chief Justice said, that as the court had no doubt about the case, the application could not be granted.

for said discounting, by way of interest, but colourably as commission, *because the said note was payable at Hamilton*, a greater rate of interest than *seven per cent.*, to wit, *thirteen per cent.*, and that plaintiffs received said rate, &c.: that plaintiffs had an office at Hamilton, where the note was made payable; and that defendant Taylor endorsed the note for accommodation, &c., and without value, &c.

Demurrer.—That the plea was no answer to the action, as there was no longer any forfeiture of the money lent, or avoidance of security taken, by a bank, where there was an agreement for interest beyond seven per cent.

J. H. Cameron, Q. C., for the demurrer, cited *Kaines v. Stacey*, 9 C. B. 155; *Dwarr*. 2nd ed. 508, 537, 556, 561, 568, 570, 571, 574, 578, 592, 638.

Anderson, contra, cited *Sills v. Kerby*, 8 Gr. 510.

RICHARDS, C. J., delivered the judgment of the court.

Supposing sec. 9 of the Consolidated Statutes of Canada, ch. 58, had simply declared that no bank shall take or receive a higher rate than is allowed by the act, and all bonds, promissory notes, &c., made or executed in contravention of the same, or whereby a greater interest is reserved and taken than is authorised by the act, shall be utterly void, would it not be considered that the corporation holding the note which was thereby declared void had incurred a penalty or forfeiture, to wit, the loss of the note or money it represented, in consequence of violating the law. I think it would, and in construing such a statute we should apply to it all the rules for construing a *penal* statute.

Does the fact, then, that the legislature have added a further penalty and forfeiture make this not a penalty or forfeiture?

The object of the Consolidated Statute of Canada, ch. 58, and of the statutes that preceded it, which were thereby consolidated, seems to have been to repeal (except so far as banks and certain incorporated companies were concerned) all the penal parts of the usury laws, except as to contracts

made between 1854 and 1858; and as to them the only forfeiture that remained was, the contract was made void as to the excess of interest beyond six per cent.

As to banks, they were permitted to receive seven per cent. interest, and certain commission when bills and notes discounted were payable at certain places other than those in which they were discounted.

Then, as to corporations or associations of persons authorised by law to lend or borrow money before 16th August, 1858, by sec. 9 they were forbidden to take more than six per cent. per annum for any loan.

But that portion of the section did not extend to banks, nor to the corporations referred to, where it was otherwise authorised and provided by that act, or by some other act or law. The next portion of the section in effect provides, and I think may read, and (except as otherwise authorised and provided by this act or by some other act or law) "all bonds, bills, promissory notes, contracts and assurances whatsoever, made or executed in contravention of this act, whereupon or whereby a greater interest is reserved and taken than is authorised by this act, or by some other act or law, shall be utterly void." The remaining portion of the statute is, "and every bank and banking institution, and every corporation and company and association of persons, not being a bank authorised to lend or borrow money as aforesaid, which directly or indirectly takes, accepts and receives a higher rate of interest, shall forfeit and lose for every such offence treble the value of the money, &c., lent or bargained for," to be recovered in any court of competent jurisdiction.

It seems to me that a reasonable interpretation of the section is, that as to any bank or corporation violating the provisions of the act, as a punishment for that violation, the note or other security taken is declared void, and the corporation liable to the further penalty of three times the value of the moneys, &c., lent or bargained for.

This, then, was the state of the law when the statute 29 & 30 Vic. was passed. The fifth section, the only one in

fact applicable to this question, reads thus: "No bank shall, after the passing of this act, be liable to *any penalty or forfeiture* for usury under the *ninth* section of chapter fifty-eight of the Consolidated Statutes of Canada, intituled '*An act respecting interest,*' but the amount of interest or commission which such bank can receive shall remain as limited by said chapter.

The penal part of section 9 of the Consolidated Statute is to the same effect as the penal parts of U. C. Statute, 51 Geo. III. ch. 9, sec. 6. That section declared that all bonds, contracts, assurances, &c., whereby a greater interest than six per cent. shall be reserved or taken, "shall be utterly void, and any person receiving a higher rate shall forfeit and lose treble the value of the moneys, &c., lent or bargained for."

If the money secured by the note or agreement is not *forfeited* when the instrument is declared wholly void, because arising out of a contract which is prohibited, then the bank ought to be able to recover by law the money back in an action for money had and received; yet, I apprehend, they would find it exceedingly difficult to do that.

Is the declaring the security taken on the illegal contract wholly void a *penalty* or *forfeiture*?

In Tomlin's Law Dictionary *forfeiture* is said to be the effect or penalty of transgressing some law.

In Worcester's Dictionary *penalty* is punishment, whether in property or person imposed by law or judicial decision; *forfeiture*, a loss of property, right or office, as a punishment for some illegal act or negligence.

In Crabbe's Synonymes *penalty* signifies what gives pain by way of punishment; *forfeit* signifies *to do away or lose* by doing wrong.

If sec. 9 of the Consolidated Statute is to be considered a penal section, and I have no doubt it must be so viewed, then the act amending it, being one to relieve from penalties, ought to receive a liberal construction.

Some argument may be raised on the word "liable" to any penalty, as shewing the legislature meant, liable to be

sued for a penalty. I think, however, this use of the word would be too restricted : it may well be rendered, subject to penalty or forfeiture.

If we limit the effect of the statute of the last session of parliament to relieving the banks only from the forfeiture of three times the value of the moneys, &c., lent or bargained for, then we do not give full force to the enactment, which says that they shall not be liable to *any* penalty or forfeiture for usury under that section. The declaring of the note utterly void is effected by that section : no other part of the statute makes it so ; and, when the legislature refers so specifically to that section, and says the bank shall not be liable to *any* forfeiture under it, we must hold that it does not make the note now sued on “utterly void.”

It may also be argued with considerable force that *the penalty* for a violation of the statute was the making of the securities utterly void, *and* subjecting the party to an action for three times the value of the moneys so lent, both being *the* penalty.

In that view there would be no doubt as to the effect to be given to the fifth section of the act of last session.

Judgment for plaintiffs on demurrer.

CRYSDALE V. MOORMAN.

Authority of judge in Practice Court.

Held, on the authority of *In re Sams v. The Corporation of Toronto*, 9 U. C. 181, that a judge sitting in Practice Court has no authority to issue a rule *nisi* for a *mandamus* in a cause pending in the County Court.

C. W. Patterson obtained a rule *nisi* in the Practice Court, returnable in this court, calling upon the judge of the county court of the county of Hastings to shew cause why a *mandamus* should not issue, commanding him to certify to this court all the proceedings in this cause in the court below, for the purpose of appeal from the judgment of that court.

A. Dimond shewed cause, and objected that the cause not being one pending in either of the superior courts, nor a matter ordinarily determinable on motion, the Practice Court had no jurisdiction to issue the rule *nisi*. He referred to Consol. Stat. U. C. ch. 10, sec. 9; *In re Sams v. The Corporation of Toronto*, 9 U. C. 181; Tapp. Man 296.

C. W. Patterson, contra, cited *Ford v. Crabb*, 8 U. C. 275, and argued, on the construction of the statute, that the Practice Court had jurisdiction.

RICHARDS, C. J.—We think, on the authority of the case cited, and for the reasons there given, the preliminary objection taken to the application fatal, and that the rule must be discharged with costs.

Rule discharged with costs.

CARSCALLEN V. THE CORPORATION OF THE MUNICIPALITY OF SALTFLEET.

Trespass, q. c. f.—Highway—Right of owner of soil to eject—Estoppel—Pleading.

Trespass *quare clausum fregit*, certain land of the plaintiff, in the township of Saltfleet, digging and making drains, &c., converting same into road or highway, and expelling plaintiff therefrom.

Second plea, land not plaintiff's

Fourth plea, as to the digging and making drains for six years next before action brought, and maintaining the land during that period as a highway, and keeping plaintiff out of exclusive possession,—that before and during the period of six years before action brought, there was a highway over the whole of the said land, upon which statute labour had before and since been annually performed; that during said six years defendants, as such municipal corporation, had jurisdiction over said highway; that the *soil and freehold* of said land, being such highway, were during that period vested in the Crown, or in defendants under the statute in that behalf, and defendants were thereby bound during said period to keep said highway in repair. The plea went on to deny the reservation of any rights in the soil by any individual, or the exclusive possession during said period by plaintiff, or any other person, but averred that the same had been used as a highway, and that the trespasses complained of were committed for the purpose of repairing the said highway.

Replications, to so much of the pleas as related to that portion of the trespasses committed since the commencement of an action of ejectment

brought by plaintiff against defendants *for the same* land, that defendants were estopped, by the recovery of judgment by default in that action and possession taken thereunder, from pleading said pleas:

Held, on demurrer, replications good, the exceptions thereto being sustained neither in fact nor law; in fact, because plaintiff did not bring ejectment for a *highway*; and in law, because suing as plaintiff did sue, he rightly brought his action for so much land, though there was a right of way over it for the public, in accordance with the law as laid down in *Goodtitle v. Alker*, 1 Burr. 133.

Held, also, that the writ in ejectment not having described the property sued for as a *highway*, the recovery in that action would not have estopped the defendants from setting up, under a proper plea, that the land was a highway, and that they entered upon it for the purposes of repair; for that the recovery was not absolutely irreconcilable with the fact of the land having been all along a highway, the plaintiff, and not the defendants, being the owner of the soil, the public having the right of way over it, and therefore the right to enter and make repairs; but that defendants could not, after the recovery in ejectment, set up the pleas they had pleaded; the second, denying that the land was plaintiff's property, and the fourth not being confined to a mere assertion that the land was a highway, but distinctly alleging the soil and freehold of the land to be in the Crown, or in defendants; besides other averments quite opposed to plaintiff's having any right in the property, and therefore to his right to recover in ejectment, as he had recovered.

The declaration stated that the defendants broke and entered certain land of the plaintiff, known as that part of lot number thirty-three, in the third concession of the township of Saltfleet, in the county of Wentworth, by the defendants wrongfully taken, held and used, as the road connecting the, in that part originally disconnected, original allowances for road, between the third and fourth concessions of said township, such land, when so broken and entered, being enclosed by and with the plaintiff's fences, and without the leave or license of the plaintiff, and against his will, then broke down and removed the fences thereof, and then dug and made drains, ditches and excavations thereupon, and converted the same into a road and highway, whereby the same had been, and was greatly injured and spoiled, and rendered greatly unfit for cultivation; and afterwards, to-wit, on the 12th of October, 1866, expelled and removed the plaintiff therefrom, whereby the plaintiff had sustained damage.

The second plea was that the land was not the land of the plaintiff's, as alleged.

The fourth plea was, as to so much of the declaration as consisted of digging and making drains, ditches and excava-

tions on the said land, for six years next before the commencement of this suit, and during that period using and maintaining the said land as a public highway, and keeping and continuing the plaintiff during that period ejected and removed from the exclusive possession of the land; that before and during the period of six years next before the commencement of this suit, there was a common and public road and highway into, through, and over the whole of the said land, upon which road and highway the statute labour had theretofore been and ever since had been usually performed, and during the said six years the defendants, as such municipal corporation, had jurisdiction over the said highway; that the soil and freehold of the said land, being such highway, were during the whole of the last mentioned period vested in the Crown, or in defendants by virtue of the statute in that behalf; and that the defendants during the whole of the said period were bound by the statute in that behalf to keep the said road or highway in repair; and that the said highway was not laid out by any individual who reserved any rights in the soil thereof, and was not a concession or other road, within the township, taken and held possession of by any individual in lieu of any street, road, or highway, laid out by him without compensation therefor; and that during the said period of six years neither the defendants, nor any other person or persons, had had the exclusive possession of the said land, or any part thereof, but during that period the same ought to have been, and had been of right, freely used as a public highway by all her Majesty's subjects travelling thereon; and that the road or highway had never been owned by any joint stock road company; and that the trespasses in the introductory part of the plea mentioned, were committed by the defendants for the purpose of keeping the said road or highway in repair, and maintaining the same as such public highway as aforesaid, as they lawfully might do, for the causes aforesaid.

The replication to so much of the second plea as related to that portion of the trespasses complained of, which were committed since the commencement of the action of eject-

ment, afterwards mentioned, was, that the defendants ought not to be admitted to plead such second plea to the trespasses in the introductory part of the replication specified, because, &c., (setting out the issuing of a writ of ejectment on the 14th of September, 1866, directed to the defendants, for the purpose of recovering from them the possession of the land in question, which had been wrongfully taken, held and used, as the road then connecting the, in that part originally disconnected, original allowance for road between the third and fourth concessions of Saltfleet, which the plaintiff claimed to be entitled to, and to eject all other persons therefrom); that service was duly made on the defendants, and that they failed to appear, and judgment by default was entered against them, and a writ of possession issued before commencement of this suit, and the plaintiff was duly put in the possession of the said land.

The same replication was pleaded to so much of the fourth plea as related to the trespasses which were committed since the commencement of the said action of ejectment.

The defendants demurred to the replications, because the plaintiff could not maintain an action of ejectment for a common and public highway of such a character, and under such circumstances as the replications admitted, and the judgment in ejectment was not therefore an estoppel.

S. B. Freeman, Q.C., for the demurrer :

That there may be an estoppel in such a case the following authorities shew: *Vooght v. Winch*, 2 B. & A. 662; *Doe v. Huddart*, 2 C. M. & R. 316; 2 *Richardson's C. P. Prac.*, 444.

Ejectment will lie for a highway: *Goodtitle v. Alker*, 1 Burr. 133; *Totten v. Halligan*, 13 U. C. C. P. 567. Amongst these cases are to be found *The Minister, &c., of St. Julian, Shrewsbury*, v. *Cowley*, 1 C. & P. 123; and *The Corporation of Sarnia v. The Great Western Railway Co.*; 21 U. C. Q. B. 59.

R. Martin, contra :

It is not now denied that the recovery in ejectment can be

replied by way of estoppel: the cases already cited establish this. He referred also to *Astin v. Parken*, 2 Burr. 668.

There is no difference between a judgment by default and a judgment on a verdict: *Astin v. Parken*, just cited, and *D'Arcy v. White*, 24 U. C. Q. B. 573. He referred also to *Fitzgibbon v. The City of Toronto*, 25 U. C. Q. B. 137, and to several other cases.

A. WILSON, J., delivered the judgment of the court.

The summons in ejectment was for the recovery "of possession of that part of lot No. 23, in the third concession of Saltfleet, by the defendants wrongfully taken, held and used, as the road now connecting the, in that part originally disconnected, original allowances for road, between the third and fourth concessions of Saltfleet," and the defendants were called upon to deny this alleged title of the plaintiff if they desired to do so. The defendants did not appear, and therefore by the judgment by default, which the plaintiff obtained, they are now estopped from disputing the plaintiff's title to the land in question.

The plaintiff did not bring his action to recover possession of a highway, as the defendants have alleged: the action was brought to recover a certain parcel of land which the defendants had wrongfully used as a road; and ever since the case of *Goodtitle d. Chester v. Alker* (1 Bur. 133) the law has been settled that "an ejectment will lie by the owner of the soil for land which is subject to passage over it as a public highway," and the sheriff will deliver to the plaintiff the land, subject to the way or easement of the public.

This decision has been considered to be good law, and is so laid down in all text books: *Roscoe on Real Actions*; *Woolrych on Ways*; *Crabbe's Law of Real Property*; *Cole on Ejectment*, and the case of *Doe d. The Queen v. The Archbishop of York* (14 Q. B. 109), and some of the cases there referred to, shew the same view of the law.

The ground of demurrer taken by the defendant is not,

therefore, sustained in fact or in law. It is not sustained in fact, because the plaintiff did not bring his ejectment *for a highway*; and it is not sustained in law, because suing, as the plaintiff did here, he rightly brought his action for so much land, although there was a right of way over it for the public; and, if the case were to be disposed of upon this ground alone, the judgment would without further question be against the defendants.

But there is the further and more important consideration, which was suggested on the argument, which has to be decided; whether the defendants may not, without contesting the propriety or effect of the recovery had against them, still assert that the *locus in quo* is a highway, and that they entered upon it for the purposes of repairing it, and so are not liable for the trespasses complained of in this action.

The defendants may still plead that the land is a highway, if that allegation be not inconsistent with the former action; and it will not be inconsistent with it, if the plaintiff could have recovered upon the writ, which he took out, all the land involved in this action, subject to the alleged right of passage and easement of the public over it as a highway: *Howlett v. Tarte* (10 C. B. N. S. 813). But it will be inconsistent with it, if it has been admitted that the plaintiff did recover in that action only because the *locus in quo* was his private property, and not a highway.

The writ of ejectment did not describe the property as a highway, or that it had been wrongfully taken, held and used as a highway, but merely that the defendants had wrongfully taken; held and used it "as the road now connecting the, in that part originally disconnected, original allowances for road, between the third and fourth concessions;" but what sort of road this may have been does not appear.

It does not appear, then, that any estoppel arises on the face of the writ itself; and the present declaration, which alleges that the defendants converted the *locus in quo* into a road and highway, does not, we think, constitute any estoppel: it is not, at any rate, the estoppel which is relied upon.

The recovery of the plaintiff does not appear to us to be absolutely irreconcilable with the fact of the land having been all along a highway, the plaintiff, and not the defendants being the owner of the soil, and the public having the mere right of passage over it; and therefore the public would still have the right to enter and make all the necessary repairs, as an incident to the right of user: Com. Dig. 'Chimin' D. 6; *Gerrard v. Cooke* (2 N. R. 109). But the defendants' pleas are not such as they could properly plead after the recovery in ejectment.

The second plea, that the land was not the plaintiff's property, they are certainly excluded from pleading now; and the fourth plea, as it is pleaded, cannot properly stand in the face of the former recovery. The plea is not confined to the mere assertion that the land was a highway, and that the defendants dug and excavated it, &c., for the purpose of repairing it as a highway; but it distinctly alleges that the soil and freehold of the land, being such highway, were during all the time therein mentioned vested in the crown, or in the defendants under the statute in that behalf, and setting out other averments quite opposed to the plaintiff having any right whatever in the property, and quite opposed, therefore, to any right to recover in ejectment, as he certainly did recover.

We must give judgment against the defendants, so far as these pleas are answered by the estoppels which have been replied.

But what avail all these proceedings may be we cannot tell. It does not necessarily follow that because these defendants are estopped from setting up any title in the alleged highway in themselves, that the plaintiff has become entitled, as against the public, to exclude them from the use of it, as a highway, if they have rights independently of any title of ownership to the soil, which the defendants may have had, or may have lost or forfeited by letting judgment by default pass against them, or otherwise.—See the observations of the Chief Justice in the case of *FitzGibbon v. The City of Toronto* (25 U. C. Q. B. 137), cited on the argument.

We suppose highway or no highway may be tried in an ejectment or action of trespass against the municipality or person or body claiming the right, at the suit of the alleged owner, or, in an indictment, at the instance of the municipality or other person or body representing the public, against the person alleging private ownership; and that all or any of such proceedings may be an estoppel, and establish or extinguish the highway, according to the result; excepting that the recovery in ejectment will only be an estoppel in the subsequent action for mesne profits founded upon it, and not to any future action of ejectment which may be brought to try the title over again.

If the alleged estoppel did not in any such proceedings sufficiently appear on the face of the record, we see no reason why it could not be made sufficient by such averments as would give it the proper conclusive effect.

For the reasons before stated, we think, there must be judgment for the plaintiff, and against the demurrer.

Judgment for plaintiff on demurrer.

MILLER V. MILLER.

Replevin—Divisibility of pleadings—Actual user of goods—Exemption from seizure—Duplicitv—Pleading.

Replevin is maintainable as the law was before the Replevin Act, and in a far more comprehensive manner since that act, for goods taken which were not properly seizable; and that, though goods properly seized be replevied with the others.

This action is divisible, and therefore a plaintiff may plead a plea which only goes to part of the cause of action.

The actual user of goods, of whatever kind, exempts them from seizure, either by distress or otherwise, and whether, in the case of distress, there be a sufficiency or not of other goods on the premises liable therefor.

A plea was held not objectionable, on the ground of duplicity, for stating that the articles distrained and replevied were beasts of the plough and an implement of husbandry, and also that they were in the actual use of the plaintiff; because the articles were not absolutely privileged, but only *sub modo*, and to constitute an absolute privilege it was necessary further to have alleged that there was a sufficiency of other goods on the premises liable to be distrained; but as that could not be alleged in this case, plaintiff was entitled to rely on the actual user at the time

of distress, which exempted them as fully as if there had been other goods liable to seizure.

A plea, which alleged that there were other articles on the premises besides the privileged articles, *held* good, as affording a sufficient answer to the seizure.

Replevin for two horses, one waggon, one set double harness, five acres of peas, four acres of oats, and two hundred bushels of wheat.

Avowry for rent in arrear due by plaintiff.

2nd plea to avowry, as to the two horses and waggon,—That plaintiff was a husbandman, and the horses and waggon were, at the time of the taking, the cattle and beasts of the plough and the implements of husbandry of the plaintiff, by him then used as such upon the said land, and were then in the actual use of the plaintiff, and in his actual possession, and under his personal care, in and about his said business, and wherewith he tilled and cultivated the said land.

The 3rd plea was the same as the last, but adding, that at the time of the taking there were upon the premises sufficient other goods and chattels liable to be taken as a distress to satisfy the arrears of rent.

The defendant demurred to these pleas, stating the following causes of demurrer thereto:

To the second plea—

1. That in replevin for distress for rent the plaintiff could not plead a plea which only went to part of the cause of action declared for, the action being indivisible.

2. That the horses, being beasts of the plough, and the waggon being an implement of husbandry, were only exempt from seizure when there were other goods on the premises sufficient for the distress, and such a sufficiency was not alleged in the plea.

3. That the waggon was not exempt from seizure, such exemption extending only to beasts of the plough and sheep; and the mere fact of the horses and waggon being in actual use did not exempt them from distress; but, if exempt, the remedy was not by replevin, but should have been by an action for damages.

4. That the plea was double in setting up, as a defence to

the avowry, that the horses and waggon were beasts of the plough and an implement of husbandry, and also that they were in the actual use of the plaintiff at the time of the seizure.

To the third plea :—

1. The same cause of objection was stated as in the first ground of demurrer to the second plea.

2. That the waggon was not exempt from seizure, such exemption extending only to beasts of the plough and sheep, and it was not alleged that it was in actual use at the time of the seizure.

3. That, if the said goods were exempt, the remedy was not by replevin, but should have been by an action for damages.

In Michaelmas term last *Robert A. Harrison*, for the demurrer :—

Some goods are absolutely privileged from distress for rent, and if taken may be replevied : others are only privileged in a qualified manner, as if there are other goods on the premises sufficient to answer the distress ; and these goods cannot be replevied, the remedy in such a case being by an action of trespass, or on the case : *Piggott v. Birtles*, 1 M. & W. 441 ; *Gordon v. Falkner*, 4 T. R. 565 ; *Storey v. Robinson*, 6 T. R. 138 ; *Jenner v. Yolland*, 2 Ch. 167 ; *Brown v. Shevill*, 2 A. & E. 138 ; *Harvey v. Pocock*, 11 M. & W. 740 ; *Field v. Adams*, 12 A. & E. 649 ; *Wharton v. Naylor*, 12 Q. B. 679 ; *Keen v. Priest*, 4 H. & N. 236 ; *Nargatt v. Nias*, 1 El. & El. 439 ; *Woodfall's L. T.* 8th ed. 743, 4.

In *Fenton v. Logan*, 9 Bing. 676, and *Gildersleeve v. Ault*, 16 U. C. Q. B. 401, the remedy was by replevin ; but the question whether it was the proper remedy was not raised in either case.

In *Mennie v. Blake*, 6 E. & B. 842, it is said replevin is confined to cases of distress only ; and in *Crawford v. Thomas*, 7 U. C. C. F. 63 ; *Henderson v. Sills*, 8 U. C. C. P. 68 ; *Haacke v. Marr*, 8 U. C. C. P. 441, and *Sills v. Hunt*,

16 U. C. Q. B. 521, the courts assumed that but for our statute goods could not be replevied excepting in cases of distress.

An avowry for only part of the property taken is not sustainable : *Woodfall's L. T.* 8th ed. 763 ; *Fenton v. Logan*, 9 Bing. 676 ; *Davies v. Aston*, 1 C. B. 746.

In *Haggart v. Kernaghan*, 17 U. C. Q. B. 341, it was assumed the verdict was not divisible under the old law, but that it was so under our statute.

Duplicity is a ground of general demurrer : *Filliter v. Moodie*, 22 U. C. Q. B. 71.

S. Richards, Q. C., contra :—

The plea is not double : it merely states that the articles of husbandry were in actual use : the actual use is the only point in issue.

The plea need not cover all the articles replevied : under the Replevin Act this is clearly so : *Henderson v. Sills*, 8 U. C. Q. B. 68 ; *Sills v. Hunt*, 16 U. C. Q. B. 521. If the law privileges certain articles from distress, why should the owner not get *them* back ? It can be no reason for depriving the owner of these things wrongfully taken, that other things have been wrongfully taken too.

Nargett v. Nias, 1 El. & El. 439, shews that an action of trespass will lie for taking goods privileged *sub modo*, and if so, replevin is also maintainable ; and *Fenton v. Logan* is expressly in point, for that was an action of replevin.

The cases cited on the other side shew that the pleas are sufficient in law.

A. WILSON, J., delivered the judgment of the court.

Whether replevin is maintainable at the common law for any other taking of goods than those taken as a distress for rent, we are not called upon to decide. *Mennie v. Blake* (6 E. & B. 842) does not decide that this remedy is applicable only to the case of goods taken by way of distress : it merely decides that the taking, to support a replevin, must not be a constructive taking only, as the refusal to deliver

to the owner goods until that time lawfully in the possession of the person upon whom the demand was made, but an actual taking by which the possession has been changed, and that while trespass or trover may be maintained for a constructive taking, replevin cannot.

We are not called upon to decide it, or to express any opinion concerning it, because this is a case of taking in distress for rent, and because our statute declares that the remedy by replevin may be adopted wherever goods have been *wrongfully distrained*, or have been *otherwise wrongfully taken or detained*, and the owner is capable of maintaining an action of *trespass or trover* for them.

We have only to decide that replevin is maintainable as the law was before our statute for goods taken as a distress which were not properly seizable. *Travers v. Wyatt* (3 Burr. 1498); *Fenton v. Logan*, before cited, and *Keen v. Priest* (4 H. & N. 236), shew that replevin does lie in such a case, and that it is unquestionably maintainable since and by virtue of our Replevin Act in a far more comprehensive manner.

The second plea is not objectionable for stating that the articles were beasts of the plough and an implement in husbandry, and also that they were in the actual use of the plaintiff, because the articles were not absolutely privileged, but only *sub modo*; and to constitute an absolute privilege it was necessary to have alleged that there was a sufficiency of other goods on the premises liable to be distrained, or some other sufficient reason, and therefore the plaintiff was entitled to rely on the actual user of the goods at the time of the distress as a ground of exemption, which prevented the defendant from taking them as fully as if there had been other goods not privileged which he could have taken: Co. Litt. 47 a; *Field v. Adams* (12 A. & E. 649).

The actual user of the goods makes them privileged from seizure, whether they be beasts of the plough or not, or whether the right to take them be claimed by way of distress or otherwise: *Sunbolf v. Alford* (3 M. & W. 248). The further question then is, whether in replevin the plaintiff can plead to part of the goods that they were in actual

use, or that they were otherwise privileged from distress, and claim the right to retain such privileged goods, although he may have no cause of action in respect of the remainder of the goods.

Our statute, placing this action on the same footing as trespass or trover, would, if there had been any doubt of the matter, have been probably sufficient to enable us to determine that question in favor of the plaintiff; but, apart from the statute, we cannot see how any doubt can arise with respect to it.

If the taking of a single seizable article could do away with the exemption of every properly privileged article, there would practically be no longer any privilege whatever.

All the claimant would have to do would be to take privileged goods to the extent of his demand, and an unprivileged article of the fiftieth part of the value of it, and then defend the whole seizure by the single article rightfully taken, although all the rest of it was unlawfully taken.

In this way things annexed to the freehold, things to be worked up in trade, cocks or sheaves of corn, beasts of the plough, and implements of husbandry, and the tools of a man's trade, could always be taken, and so could the horse on which he was riding, or the axe in his hand, or the coat on his back, so long as six pence worth of something else was taken at the same time, which could be justly taken. It is not denied that trespass or trover might be brought, but it is said that these are the only remedies. We think they are not the only remedies, and that the beneficial remedy of replevin is also open to the party, if he choose to adopt it: the mere statement of the case is, in our opinion, an answer of itself to the argument.

There are, however, several cases which sufficiently shew that the demand in replevin, as in other forms of action, is divisible.

In *Keen v. Priest* (4 H. & N. 240) a cart, colts, young steers, and sheep, had been distrained for rent. The court held the colts and young steers were not animals that *gained* the land, and were therefore not privileged at all.

Counsel said, in argument, "The plaintiff might have replevied and got back his sheep." *Bramwell*, B., said, "The plaintiff might have rescued the sheep," and referred to Com. Dig. "Distress" D. 5. *Martin*, B., said, "The sheep might have been rescued." *Watson*, B.: "The seizure of the sheep was wholly illegal: if the plaintiff had replevied he would have been entitled to a return of the sheep: the defendant never had any rightful possession of the sheep."

In *Harvey v. Pocock* (11 M. & W. 740) it was held that the party distraining improperly privileged goods is a trespasser *ab initio*, and that the privileged goods were separable from the other goods.

Nargett v. Nias (1 El. & El. 439) was, like the two preceding cases, an action for trespass for taking privileged goods.

As it is very plain that such articles wrongfully taken could have been rescued or replevied, we do not see how the right to rescue or to replevy them can be lost, by rescuing or replevying something along with them which was justly taken.

The different grounds taken might be subject to different answers, as that a part was in actual use, another part absolutely privileged, and a third part privileged because there was a sufficiency of other goods on the premises; and no reason has been stated why each answer should not be judged of by itself as to the particular goods to which the plea applied, as was done in the case of *Davies v. Asten* (1 C. B 746), and as in *Dod v. Monger* (6 Mod. 215), where several barrels of beer were distrained for rent and the distrainor drew beer out of one of them, and it was held that this rendered him a trespasser *ab initio* only as to the single barrel.

Henderson v. Sills (8 U. C. C. P. 68) and *Sills v. Hunt* (16 U. C. Q. B. 521) are expressly in point, that the pleadings in this action are divisible; and whether it be so under our special statute, or as the law stood before it was passed, is of no great moment. *McBride v. Lee* (16 U. C. C. P. 315) and *Traherne v. Gardner* (8 E. & B. 161) shew to

what extent the causes of action are divisible. In *Price v. Woodhouse* (1 Exch. 565) it is discussed whether distraining goods not distrainable with those that are does or does not make the distrainer a trespasser *ab initio* as to the whole.

The third plea, which alleges that there were other goods on the premises besides the privileged goods, affords a good answer to the seizure, and none of the objections that have been taken to this plea are entitled to prevail. The judgment will, therefore, be for the plaintiff on the demurrers to the second and third pleas.

Judgment for plaintiff on demurrer to 2nd and 3rd pleas.

GLASS V. O'GRADY.

Assault and battery—Excess—Amendment.

Held, following *Davis v. Lennon*, 8 U. C. 539, that if more force and violence be used than necessary to expel a party from a house, after he has been requested and refused to leave, the excess must be replied; but if a plaintiff relies on the fact that he was assaulted and beaten not for the purpose of expelling him from the house, on his refusal to leave, as pleaded by defendant, then it is proper to take issue on defendant's plea, the *bona fides* of which becomes thenceforth the subject of enquiry.

Per *A. Wilson, J.*, that though the defendant's plea be disproved, as to the motive with which he assaulted plaintiff, the latter cannot, nevertheless, under a mere joinder of issue on defendant's plea, recover, if the defendant did no more than he had the right to do to effect the removal; for the motive, intent and purpose with and for which the assault took place are not in issue, so long as he had the cause of justification, in fact, for what he did.

Quære, whether a plaintiff can now assign that the acts complained of were committed by defendant for other causes and purposes than those set forth and justified by the plea.

Semble, that the replication of excess may be added, by way of amendment, at the trial; and if so, by the court, even after judgment in the cause.

In an action for assault and battery plaintiff was allowed at the trial to amend his declaration, by adding that he thereby "became and was and is permanently injured:" *Held*, that the amendment had been properly allowed.

This was an action for assaulting and beating the plaintiff, whereby his arm was broken, and he became sick and wounded, and was for a long time unable to transact his business, and incurred expense for nursing and medical attendance; and, as added at the trial, by amend-

ment, "whereby the plaintiff became and was and is permanently injured;" and the plaintiff claimed \$1,000.

The defendant pleaded 1st, not guilty; and secondly, that he was possessed of a certain house, and being so possessed thereof the plaintiff entered it, and made a noise and disturbance therein against the will of the defendant, who requested him to cease therefrom and to go out of the house, which the plaintiff refused to do; whereupon the defendant in defence of the possession of his house, gently laid his hands upon the plaintiff in order to remove him from said house, using no more force than was necessary to eject the plaintiff from said house, which were the supposed trespasses mentioned in the plaintiff's declaration.

On these pleas the plaintiff joined issue.

The cause was tried before *Hagarty, J.*, at the last assizes held at Sarnia, for the county of Lambton, when it appeared in evidence that plaintiff had gone into defendant's office and sat down, and that both parties had then begun to settle for some work done by plaintiff for defendant. Some misunderstanding arose, and plaintiff called defendant mean, whereupon defendant told plaintiff to go out, but plaintiff said he wanted his money, when defendant got up in a passion and again ordered him out, plaintiff, however, demanding his money before he would go. On this defendant picked up a bar of iron, again told him to go out, and hit him on the head, while plaintiff was still sitting down. Plaintiff seemed to have lifted his arm in order to guard his head from the blow, and in doing so had it broken.

The learned judge, in charging the jury, stated that he felt some hesitation from the absence of a replication of excess, but thought that on the facts the plea seemed hardly proved; that the plaintiff was quietly sitting on a chair when told to go, and instead of defendant "gently laying his hands, &c.," he at once knocked him down with an iron bar, cutting his head and breaking his arm; that had defendant attempted to remove him from the place in any intelligible way, it would have been different, but a prompt and terrible blow, a pistol shot, or a stab, seemed hardly

within the rule. He asked the jury whether such a proceeding was a *bonâ fide* attempt to make a man leave another's house except as a corpse, and whether the plea was proved.

The jury found for the plaintiff \$800 damages.

D. McMichael, for defendant, obtained a rule *nisi* to shew cause why the verdict should not be set aside and a nonsuit entered pursuant to leave reserved, or a new trial had between the parties; on the grounds that the verdict was contrary to law and evidence; that the judge directed the jury that evidence of excess as to the trespass could be given, although the plaintiff had not replied excess; that evidence was allowed of excessive violence in answer to defendant's plea; for allowing improper amendments to the declaration; and for excessive damages.

S. Richards, Q. C., shewed cause, and contended that the defendant had not made out his plea; that his conduct shewed, that his object was not to get plaintiff out of his house, but to beat him; and he did so beat him that he could not go from his house. He cited *Penn v. Ward*, 3 Cr. M. & R. 338; *Dean v. Taylor*, 11 Exch. 68; *Oakes v. Wood*, 2 M. & W. 791; *Noden v. Johnson et al.*, 16 Q. B. 218; *Davis v. Lennon et al.*, 8 U. C. R. 599; *E. Counties R. Co. v. Dorling*, 5 C. B. N. S. 832; *Neville v. Cooper*, 2 Cr. & M. 329; *Price v. Taylor*, 4 N. & M. 460.

McMichael, contra, contended that, where it was shewn that the plaintiff had been disturbing the defendant in his house, that he had been requested to go out, and that in consequence of his refusal he had used the violence complained of, his justification was complete, and that the learned judge should have ruled so and non-suited the plaintiff, instead of allowing him to shew the extent of the injury, and directing the jury to say the plaintiff had made out his case, and whether the defendant had not sustained his plea. He further contended that the damages were excessive, and that the defendant ought to have a new trial on this ground. He cited

Glover v. Dixon, 9 Exch. 158; *Penn v. Ward*, 2 Cr. M. & R. 341, per *Alderson*, B.

J. WILSON, J.—This case is very much like the case of *Davis v. Lennon et al.*, and the pleadings are the same. There, the defendant Lennon struck Davis. He did not push him or take hold of him to put him out; he seemed to strike him, because he did not go, and struck him with cruel violence. From the circumstances there proved the learned Chief Justice left it to the jury to say, whether they were or were not satisfied that his pretence of merely assaulting the plaintiff in order to put him out was not untrue, and that he beat him by way of punishment either from a vindictive feeling, or because he did not instantly go out when he desired him; and he added, “That although a party might lawfully take hold of one, who declined to leave his house, and might put him out, yet he had no right to beat him cruelly, not in order to make him go out, but to punish him for not going; that requesting a man to go, and then, because he did not go, striking him a cruel blow, not in order to remove him, but to punish him, was not proof of a plea of gently laying hands on the plaintiff in order to remove him.”

In giving judgment the Chief Justice said, “We do not think the case of *Oakes v. Wood* (2 M. & W. 791) presents any difficulty, from its application to this case. It determined what had been determined before, that excess must be replied, and that in a case like the present the defendant’s motive for using force to turn the party out of his house is not to be brought in question. But it would be against good sense to hold, that the very truth and substance of the defendant’s plea in such a case is not to be inquired into; that is, whether he did really assault the plaintiff in order to remove him, or for a quite different purpose; and they must judge of that from the whole evidence.”

From this, and all the cases to which we have been referred, we take the law to be, that if more force and violence

be used than is necessary to expel a party from a house, after he has been requested to leave it, the excess must be replied ; but if a plaintiff relies on the fact that he was assaulted and beaten, not for the purpose of expelling him from the house, then it is proper to take issue on the defendant's plea, and its *bona fides* then is the enquiry.

Here the question on these pleadings was, whether the beating complained of arose from the defendant's enforcing his request for the plaintiff to leave his house, or from the defendant's determination to make the occasion a pretence for inflicting on him a cruel injury.

We adopt the law as laid down in *Davis v. Lennon et al.*, and in this view we cannot hold the verdict contrary to law and evidence, or that the direction of the judge was wrong in any respect, or the amendment improper, or the damages excessive. The rule will therefore be discharged.

A. WILSON, J.—If to an assault and battery it is pleaded, that the plaintiff was in the defendant's house, and that he was requested to leave and refused, and that the defendant, in order to remove him, laid hands upon him, &c., and issue be joined upon it ; and if it be proved that the plaintiff was in the defendant's house and was requested to leave and would not, and that the defendant did lay hands on him, not to remove him, but for another and wholly different purpose ;—the plaintiff cannot recover if the defendant did no more than he had the right to do to effect the removal ; for the motive, intent and purpose with and for which the defendant did lay hands on the plaintiff is not in issue, so long as he had in fact the cause of justification before mentioned for what he did ; but if he did not in truth act upon the cause which he *primâ facie* had, the plaintiff might, perhaps, now assign that the acts complained of, and which appeared were justified by the plea, were committed by the defendant for other causes and purposes than the purposes and causes in the plea set forth : *Lucas v. Nockells* (10 Bing. 157). But this is not quite clear ; for if the defendant had in fact the cause of justification in his plea

alleged, it may be that the plaintiff cannot dispute this right, though of course he could reply excess. (See *Oakes v. Wood*, hereafter mentioned).

Taking issue on such a plea under the present system of pleading is the same as the replication of *de injuria* under the former mode of pleading, and what was put in issue by it was, whether the trespass complained of and assumed to be justified was committed *for the cause* in the plea set forth.

The replication was that the defendant committed the trespass of his own wrong and *without the cause* alleged, and the plea was held to be proved, if the defendant had in fact at the time of the trespass the cause of justification relied on. It is of no consequence that he was led to do what he did from some other motive, so long as what he did do was justified by what he sets up as his defence. If more was done than was necessary for the purpose, excess should be replied ; and if the plaintiff is complaining of a trespass committed, when the cause relied upon in the plea did not exist, he should new assign.

The case seems to some extent like a seizure of goods for one cause which is not defensible, and the party seizing has a justification on some other ground which is defensible. There, though the seizure was made for the one cause, it may be maintained by avowry or other pleading for another cause.

The case of *Oakes and Wife v. Wood* (2 M. & W. 791) is expressly in point, and there *Alderson*, B., during the argument, said, "This difficulty arises: you first put the defendant to prove the fact of disturbance, and then say it has nothing to do with the justification. Nobody can doubt that the fact, whether the plaintiff's wife did make a disturbance or not, is in issue;" and so it may be said, "Nobody can doubt that the facts stated in this plea are in issue;" and if in issue, it would seem to be idle to put the defendant to the proof of them, and when he had proved to tell him they had nothing to do with the case."

The case of *Oakes v. Wood* has been followed in *Spots-*

wood v. Barrow (5 Ex. 110), which last case itself is very strong authority for the present defendant.

If a defendant abuse an authority he has *in law* he is a trespasser *ab initio*, and when he justifies under the authority in law, the excess may be replied ; the effect of which *in such a case* is to defeat the plea altogether, and to enable the plaintiff to recover for the whole trespass, and not merely for the excess : *The Six Carpenters' Case* (8 Co. 146 b) ; *Price v. Woodhouse* (1 Exch. 559). When the authority is one not derived by law the excess must be new assigned.

Penn v. Ward (5 Tyr. 975) shews that for immoderate chastisement the excess must be replied.

Noden v. Johnson (16 Q. B. 218) merely determined that when, among other trespasses, a knocking down was substantively charged, and the plea of justification did not answer it, the plaintiff was entitled to recover damages in respect of it, upon proving it, on the general issue.

The case of *Davis v. Lennon* (8 U. C. Q. B. 599) agrees that excess must be replied when according to the English authorities it is decided to be necessary. The decision there was to the effect that the defendant must prove on a plea like the present "that he assaulted the plaintiff with a view of making him leave the house and not for a different purpose."

No doubt the allegations of the plea must be proved, and among them that the defendant requested the plaintiff to leave the house, and that he would not, and that the defendant committed the trespass complained of in order to remove the plaintiff from the house.

But it appears to me, on the authorities, that where the defendant has shewn his right to remove the plaintiff after the demand on and refusal of the plaintiff to leave, and he did no more than was necessary for the removal, that he is completely justified ; but if he did do more than was necessary, the excess must be now assigned.

I do not see that the plaintiff can on this general traverse say the defendant's purpose was not to remove, but it

was for some other purpose. The purpose is not in issue, and the effect of the decision in *Davis v. Lennon* is, to make the purpose and motive in every case a matter of enquiry on such an issue, under language which professes not to make this the real ground of decision.

While, therefore, I do not think the plaintiff should have recovered if the plea had been proved in the manner in which I think it would have been sufficiently proved, I am not in favor of disturbing the verdict, for the evidence shews that there was no actual refusal on the part of the plaintiff to leave the house when he was desired to leave it; and that the defendant's scandalous violence was not in any degree warranted; and because not in *any degree* warranted the verdict must be allowed to stand. I am glad to be able to come to this conclusion on grounds entirely satisfactory to myself, in a case where the whole merits are with the plaintiff, and the defendant's conduct has been so violent and cruel. Perhaps, too, the judge could have given leave to add a new asssignment at the trial—(See *The Eastern Counties' Railway Co. v. Dorling*, 5 C. B. N. S. 832); and probably, if the judge's attention had been called to the point at the trial, the amendment might have been allowed then: *Horton v. McMurtry* (5 H. & N. 667); and if so the amendment might be made even now. I therefore quite concur, upon the ground before stated, in discharging the rule.

RICHARDS, C. J., concurred with *J. Wilson, J.*

Rule discharged.

BLACK V. ALLAN.

Ejectment—Demise—Forfeiture—Waiver.

Plaintiff by indenture agreed with defendant to convey to him certain land, the right to purchase which had been assigned by defendant to him, on payment by defendant of certain instalments of money, and plaintiff covenanted that defendant should occupy the land until default in payment of any one instalment. After default made plaintiff joined with defendant in a reference to arbitration of all matters then in difference between them, and the arbitrators by their award postponed the date of the payment as to which defendant had been in default, and the jury found that before the day so fixed defendant had made a tender of the amount:

Held, that the instrument executed by plaintiff created a demise, or a redemise, in favor of defendant, which could have been absolutely avoided by plaintiff on the default made by defendant; but that the reference to arbitration, after the default made, had either operated as a waiver of it, or had had the effect of postponing the time for payment, before the expiration of which time tender had been made; and that in either view plaintiff could not maintain ejectment against defendant. *Quære*, whether the reference to arbitration and the postponement above mentioned would not constitute defendant a tenant at will, and so entitle him to demand of possession before action.

Suing on an award will estop a party from denying the authority of the arbitrators.

Ejectment to recover an acre of land, being on the north-east of lot No. 37, in concession A, on the west Saugeen road, in the township of Saugeen.

Defendant appeared and defended for the whole of the land.

In his notice of title plaintiff claimed the land by deed of Bargain and Sale from John Biggar, who claimed through the crown; by deed of quit claim from Henry Winch; and by two several indentures made between plaintiff and defendant, bearing date the 20th October, 1863.

The defendant, besides denying plaintiff's title, asserted title in himself, under an indenture dated sometime previously to 20th October, 1863, and made between one John Biggar and the defendant, whereby Biggar agreed to sell, and defendant agreed to purchase, for the consideration therein mentioned, the property claimed; also by virtue of an Indenture, dated 20th October, 1863, and an award, dated 10th September, 1864. There was also a suggestion on the record that, by judge's order, dated 13th October, 1865, the venue in the action was changed to the county of Grey.

The cause was tried at the last assizes for the county of Grey, held before *S. Richards*, Q. C., sitting for the Chief Justice of this court.

It appeared at the trial that the defendant made an agreement, on 9th January, 1862, to purchase the piece of land in question from one John Biggar for \$200, \$50 down and \$50 annually, on 9th January, 1863, 1864 and 1865. Defendant covenanted to pay the money on the days and

times mentioned, and all taxes ; in consideration of which, and on payment of the money, Biggar agreed to convey the land to defendant in fee simple, and that he would permit defendant to occupy the same until default in payment of any of the instalments ; and it was expressly agreed that time was to be of the essence of the contract.

On 20th October, 1863, defendant, after reciting the articles of agreement between him and Biggar, as above, in consideration of \$750, granted, bargained, sold, assigned, transferred and set over unto plaintiff the said articles of agreement and all his interest therein, and all the land therein comprised, and all the benefit and advantages to be derived from the said articles of agreement, and he appointed plaintiff his attorney for him and in his name to do all acts, deeds, &c., in anywise relating to the said articles of agreement, or arising therefrom.

On the same day plaintiff, by another indenture, reciting the above last mentioned indenture, and also that defendant had erected buildings and made large improvements on the above mentioned land, and that plaintiff had been the contractor therefor, and had built the same, agreed with defendant that if he should pay to him \$750 as follows, \$120 down, \$120 on January, 1864, \$70 on March, 1864, \$100 on 29th May, 1864, and the remaining sum of \$200 on 20th April, 1866, without any deduction, then plaintiff would well and truly convey to defendant the lands above mentioned.

Plaintiff covenanted that until default made in some one of the payments, defendant might occupy the premises and enjoy all the benefits and privileges accruing from possession thereof

The instrument, also, recited that the sum due from defendant to Biggar on the land was \$180, which had been included in the consideration of that agreement, and plaintiff was to pay that sum to Biggar ; but if defendant should pay any part of that sum to Biggar, plaintiff would allow it to him on that agreement. It was further provided that if defendant should make default in payment of any of the said sums, and a month should have elapsed without such pay-

ment being made, plaintiff might cancel the agreement and hold the premises as of his old estate, or absolutely sell and dispose of the same by public auction, or private contract. Plaintiff by the agreement was empowered to take out the deed in fee simple for the land. Time was also declared to be of the essence of the contract.

On 10th September, 1864, plaintiff and defendant entered into an agreement which stated that differences had arisen and were depending between them in relation to divers subjects of controversy and disputes, and, for the purpose of putting an end to such as were then existing, they had agreed to refer all such differences and disputes whatsoever to the award of James S. Conway, John Hislop and such third person as they might choose as umpire, which award was to be binding upon the parties, and was to be made on or before 15th September, 1864.

On 12th September, 1864, the three arbitrators made their award under their hands and seals, awarding that there was then justly due and owing to plaintiff from defendant \$178.30, upon a balance of account for work performed in building a tavern in the township of Saugeen for defendant, and they awarded that defendant should pay the same to plaintiff on or before the first of October then next, and \$200 on the twentieth of April, 1866, as named in a certain Indenture, bearing date 20th October, 1863; and as soon as defendant paid the above named amount, that plaintiff should give and transfer a good title to one acre of land square off the north-east corner of No. 37 in concession A, on the west Saugeen road, in the township of Saugeen, in the county of Bruce.

It was also admitted that on the 18th of March, 1865, plaintiff obtained from Biggar the deed of the land, as provided in the instruments hereinbefore referred to.

This closed the plaintiff's case.

For the defendant it was shewn that on 5th July, 1865, plaintiff sued out a writ in the Court of Queen's Bench against defendant, which was specially endorsed for \$178.35 on an award, and \$250 for rent of premises then occupied

by defendant as a hotel. The declaration in the suit was entitled the 6th October, 1865, and the first count was on the award, and alleged, as a breach, the non-payment of the sum of \$178.35.

The second count was for goods sold, interest, &c., and use and occupation of a messuage.

On the 13th October defendant pleaded to the second count, never indebted, and to the first count, payment of \$189.75 into court.

On 16th October plaintiff took issue on defendant's first plea, and accepted the sum paid into court in full satisfaction of the causes of action on which it was paid in.

On 12th April, 1866, plaintiff entered a *nolle prosequi* as to the causes of action in the second count of the declaration mentioned.

Defendant proved that he had arranged with one Porteous to advance the money for him to pay plaintiff. In the fall of 1864, and before the amount payable under the award was due, Porteous, who had the money with him to pay plaintiff both in gold and in bills, went to defendant's house. Plaintiff was there on horseback. Porteous told him he was prepared to pay the amount. Plaintiff refused to come off his horse, and said something to the effect that he was not willing to abide by the award. Porteous said if plaintiff would have taken the money and given him a receipt for it, he would have paid it. Porteous said to plaintiff that if he would come into defendant's house, or any neighbor's house, he would pay him the first instalment under the award. He proposed to plaintiff to pay the amount and take a receipt, or to take a conveyance of the property and give him a mortgage for the second instalment. Porteous did not offer to pay the amount without at the same time asking a receipt, and would not have paid the amount without getting a receipt. Plaintiff did not say what his reason was for not taking the money. Porteous did not count the money out to plaintiff: he had money in his hand.

Another witness, called by defendant, said that plaintiff

did not say he would not take the money, but that he would not go into the house.

The learned Queen's Counsel was inclined to think plaintiff was entitled to recover, but as it might be that the effect of the reference and award was to postpone the payment of the \$178.30 (in case it was part of the mortgage money) to the 1st of October, 1864, he decided on taking the opinion of the jury on the question of tender, and directed a verdict for the plaintiff, with leave to the defendant to move to enter a verdict for him, in case the court should be of opinion the plaintiff was not entitled to recover. As to the tender, he directed the jury that, if they found a tender of the amount was made only on condition of a receipt being given, it would not be a good tender, unless plaintiff waived the objection to the tender at the time.

The jury found there was a tender made of the \$178.30, according to the award.

In Michaelmas term *D. McMichael*, for defendant, obtained a rule *nisi*, pursuant to leave reserved, to enter a verdict for defendant; or for a new trial, on the ground that the verdict was contrary to law and evidence in this, that, by the agreement between plaintiff and defendant, defendant agreed to pay plaintiff certain moneys, and in default thereof the plaintiff should be at liberty to take possession of the premises in question in the suit; that previously to the commencement of the action differences having arisen between plaintiff and defendant relative to the moneys alleged to be due under the agreement and otherwise, they submitted all such differences to arbitration; that the arbitrators duly made their award that defendant should pay plaintiff certain moneys on the days then mentioned, in satisfaction of all claims; that defendant previous to the commencement of this suit, in pursuance of and compliance with the award and on the day in the award named, tendered to the plaintiff all money so awarded to be paid by him to plaintiff.

During the term *Robert A. Harrison* shewed cause:—

The defendant having made default in payment of the instalment of the purchase money, a subsequent tender of it, though in accordance with the award, would not of itself give the defendant the right to retain possession. Defendant's remedy is under the award, or in a court of equity, or by seeking the equitable jurisdiction of this court: *Goodeve v. Wallace*, 24 U. C. Q. B. 31; *Johnson v. Wilson*, Will. 248; *Marks v. Marriott*, 1 Ld. Ray. 144; *Goodeve v. Wallace*, 24 U. C. 31.

Lane, contra :—There was default in the payment of an instalment under the agreement. That was a matter in dispute between the parties when the reference was made, and the arbitrators having postponed the payment, the plaintiff was estopped from taking advantage of the omission to pay until the time for payment had elapsed according to the award; and a tender having been made before that time, plaintiff could not bring the action for an alleged forfeiture, which was in effect waived: *Russell on Awards*, 3rd ed. p. 4, 261, 476, 478; *Doe v. Rosser*, 3 East 15; *Hunter v. Rice*, 15 East 110; *Downs v. Cooper*, 23 Q. B. 256; *Addison on Contracts*, 2nd Am. ed. 293.

The facts shew that after default had been made in the payment of an instalment according to the agreement, plaintiff waived the forfeiture, by referring the subject matter of the dispute to arbitration, and, having once waived that particular forfeiture, he could not set it up again. Or, this other view may be taken equally fatal to the plaintiff's case: The award of the arbitrators may have postponed the payment, and a tender of the amount within the time would prevent the forfeiture. The case of *Ward v. Day*, 4 Best & Smith 337, and confirmed in Exchequer Chamber, 5 Best & Smith 359, and S. C. in Exchequer Chamber 10 L. T. N. S. 578, is strong authority for defendant on the question of waiver of forfeiture, or of his election not to avail himself of it, and the effect of a tender.

RICHARDS, C. J., delivered the judgment of the court.

If we are to consider this agreement between the parties gives to the defendant only the right of a mortgagor in possession, *Goodeve et al. v. Wallace et al.* (24 U. C. Q. B. 31) is a strong authority for the plaintiff. If the defendant is considered as a purchaser in possession, who has made default in the payment of the purchase money according to his agreement, *Prince v. Moore* (14 U. C. C. P. 349), *Robinson v. Smith* (17 U. C. Q. B. 218), *Stringer v. Ammerman* (14 U. C. Q. B. 548), seem also to be strong authorities in plaintiff's favor.

The case of *Ward v. Day*, as reported in 4 Best and Smith, carries the doctrine of waiver by a party of his right to take advantage of a proviso for a forfeiture in his favor further than it was usually considered to reach. The general impression was that when a term was created by virtue of a deed, and that was to be forfeited, the landlord might waive the forfeiture; for the term existed until it was declared to be void, and any act done after the right to claim had accrued, which in effect affirmed the term to be an existing one, might well be viewed as a waiver of the forfeiture.

Now, the right of this defendant to occupy the premises arises from the clause in the agreement, which reads thus: "And the said party of the first part (the plaintiff) hereby covenants that until default shall or may be made in any of the payments above mentioned, the said party of the second part (the defendant), or his heirs, executors, administrators, or assigns, may occupy the said premises, and enjoy all the benefits and privileges accruing from the possession thereof."

This is at least a license to occupy until default, and it well may be a question for the consideration of a jury, whether the receipt of the instalment after default would not at least make the defendant a tenant at will, so as to make a demand of possession necessary before ejecting him. If so, would not the referring the matter to arbitration and the subsequent delay well authorise a like finding as to the present defendant?

In the case of *Ward v. Day*, the owner of the land had

granted a license to take the ore that might be found in a particular part of the county, subject to a proviso that if the rent should be in arrear for twenty-one days, the grantor might by notice in writing determine the grant. It was held that it was a matter in which the plaintiff would have a right to choose what he would do. The court were of opinion that the plaintiff had waived the forfeiture, and, having once determined his election, it was determined forever. *Blackburn, J.*, in giving his judgment, said in one part of it: "Most of the cases in which the doctrine of election has been discussed have been cases of landlord and tenant under a regular lease, in which has been reserved a right of re-entry for a forfeiture; but this doctrine is not, as *Mr. Russell* seems to think, confined to such cases. So far from that being so, it is but a branch of the general law that when a man has an election or option to enter into an estate vested in another, or to deprive another of some existing right, before he acts he must elect once for all whether he will do the act or not."

As to tender, the later cases seem to lay it down; where there is anything equivocal in the conduct of the party to whom the tender is made, it is a question of fact for the jury to decide whether the tender be absolute or conditional, and whether the party dispenses with the production of the money or not. See cases noted in *Roscoe on Evidence*, under head of *Tender*; *Baun v. Owen* (11 Q. B. 139). In *Richardson v. Jackson* (8 M. & W. 298) it is doubted if requiring a receipt makes the tender bad.

The question of tender seems to me to be of little consequence in this case; for if the doctrine of waiving his right to claim possession for the default of the payment of the instalment at the time mentioned in the agreement applies, and he did waive that right, he cannot *now* assert it; for, having waived it once, it is gone as to that particular default, as far as this action is concerned.

The language of the agreement, which I have quoted, seems sufficient to create a demise or re-demise of the land to this defendant for a period sufficiently certain to make it

valid. In the argument in *Fenn v. Bittlestone* (7 Ex. 152) the counsel says, "Where the words of the instrument shew that it is the true intent of the parties that the one shall divest himself of the possession, and the other come into it for a *determinate* time, the instrument is in effect a lease." The instrument in that case declared that until default should be made in the payment of the principal sum, according to the terms of the deed, or until default should be made in payment of interest on said principal sum, after fourteen days' notice requiring payment of the same, "it should be lawful for the mortgagor to hold, make use of and possess the goods and chattels hereby assigned or intended so to be, without any manner of hinderance or disturbance of or by him, the said mortgagee, his executors, administrators or assigns." In argument it was contended that the instrument did not amount to a lease, for want of certainty of time, and that the mortgagor was a mere tenant at will under the deed. *Parke*, Baron, in giving judgment, said it was "good as a grant of a term defeasible, as suggested by Mr. *Preston* in his commentary on the passage in *Shepherd's Touchstone*, 272. It is too late to contend that the provision as to possession was a mere covenant, after the cases on this subject, concluding with *Bradley v. Copley* (1 C. B. 699);" and *Fenn v. Bittlestone* is approved by Lord *Campbell* in *Brierly v. Kendall* (17 Q. B. 938).

It was no doubt at one time considered, where the lease provided that in a certain event it "should be deemed null and void to all intents and purposes," and there was a failure to comply with the terms of the lease by the tenant, the lease could not be set up again by acceptance of rent due after breach of the condition, or by any other act; but if the proviso was that for non-payment of rent *it should be lawful for the lessor to re-enter*, the lease is only voidable. But this distinction now seems to be over-ruled, and the true construction is, that the lease shall be voidable or not at the option of the lessor: *Doe v. Banks* (4 B. & Al. 401); *Rede v. Farr* (6 M. & S. 121); and that the landlord, by acceptance of rent or the like, with notice of the breach,

will waive the forfeiture: I *Williams' Saunders*, 287 d, *note u*.

I think that, in holding the demise created by the instrument before us to be similar in effect to a lease, which by its terms, in case of default by the lessee, is to be absolutely void, we do not depart from any settled rule of law applicable to the subject, nor conflict with any of the decisions to which we have been referred.

In the case of *Goodeve v. Wallace* (24 U. C. Q. B. 31) the question of waiver of forfeiture was not expressly decided, but the case was rather disposed of on the ground of an imputation of want of good faith in entering the judgment; and *Doe v. Menx* (1 C. & P. 346) is an authority that the receipt of rent, after an ejectment is brought on a forfeiture, which was the effect of what was done in *Goodeve v. Wallace*, is no waiver of such forfeiture.

On the whole, we are of opinion that the rule to enter a verdict for the defendant should be made absolute. What occurred between the parties as to referring the amount due to arbitration was in effect either a waiver of the default then alleged to have been made, for no other default was shewn, or a postponing of the time of payment until the time mentioned in the award, and before the time limited by the award, a tender was made, as found by the jury. In either view defendant is entitled to succeed. The plaintiff sued on and enforced the award, and will not be allowed to say that the arbitrators were not authorised to make it.

Rule absolute.

LEWIS V. KELLY.

Ejectment—Title by length of possession—Conflicting evidence—New trial refused.

In ejectment, defendant claimed by length of possession by herself and ancestor. The evidence as to her possession being continuous was conflicting, and for part of the time it appeared to have been by such acts as keeping the key of the house, and leaving upon the premises one or two trifling articles, with an occasional return to the place. The whole case was left to the jury on the evidence, with a direction from the

judge that he could not say there had not been a keeping of possession shewn by defendant. It also appeared that, in any event, the most the defendant could recover would be a very inconsiderable portion of the land in question, and there had been already two verdicts against her: The court refused to protract the litigation by granting a new trial.

Ejectment to recover lot No. 12, on the east side of McNabb Street, and on the south side of Mulberry Street, in block No. 7, in the city of Hamilton.

The plaintiff claimed under a deed from John Ryerson and Mary Ryerson to him.

The defendant appeared and defended for the whole of the land therein mentioned. In her notice of title, besides denying the title of the claimant, she asserted title in herself by right of possession of herself and those through whom she claimed, for twenty years and upwards before the commencement of the suit.

The cause was a second time taken down to trial at the fall assizes of 1865, held at Hamilton before *Morrison, J.*, when a verdict was rendered for the plaintiff. It was subsequently set aside and a new trial granted, costs to abide the event.

The case was a second time taken down to trial at the spring assizes of 1866, held before *Adam Wilson, J.*, when a verdict was again rendered for the plaintiff.

The evidence for the defendant was to the effect that one Edward Develin, a brother of the defendant, occupied the place in 1842, and continued to occupy it until his death, in January, 1860; that Develin had no children, and his wife died before him. One witness stated that defendant went into the house the very day Develin died, and kept the key of it till Lewis broke into the house (about a year before the action was brought); that she had a chest and some other article of trifling value in the house prior to and continuously after Develin's death; and after she left the house she kept coming to it every week, and always locked it up when she went away; that the house was not *occupied* for a week or two after Develin's death, but defendant had it put in order, and then went into it; and she lived in it two years after taking possession.

The plaintiff proved that when a prior owner purchased the property in 1847, Develin was living in a small shanty twelve or fifteen feet square, on a corner of the lot, which was never fenced during Develin's life time; that on conversing with Develin he desired to remain, and said he would pay reasonable rent. No rent was fixed, or time he was to occupy. He never paid any rent. Between that time and 1860 the owner was at the place half-a-dozen times, and asked Develin to leave, which he said he would do, but he wanted to get a better house. He never claimed the property, but always thanked the owner for leaving him there. The owner was again at the place within a year after Develin's death. He wished to have the shanty removed, but did not take it away, as he heard a Mrs. Kelly, a poor woman, was in it, and it would be a charity to leave her there. He wrote to his agent to that effect. After that he heard that Mrs. Kelly claimed the lot as her own. He then sent a man to break open the door. The former owner paid all the taxes on the lot, amounting to \$200: it was rated as a vacant lot.

The plaintiff further proved that for a year or two before Develin's death no one lived with him: that defendant had lived with him for a time after she came to the country, but moved away sometime before his death: that Develin died in January, 1860, and defendant came to live there sometime in the spring after: that she did not remain above two months: that she left the place, and no one lived on the place after she left it, the house not being fit for any human being to live in.

The agent of the former owner stated that since Develin's death he had been in the habit of looking at the house when he came to Hamilton: he never found any one in possession of it when he went there: he was satisfied that he called first at the place as early as a few months after Develin's death, and thought he called at least twice a year since Develin's death.

The learned judge, in charging the jury, referred to the evidence, shewing that Develin was on the place in 1842;

and at the time of his death, considering the time to run from one year after 1842, he would have been not exceeding seventeen years in wrongful possession, and he thought Kelly was entitled to add on Develin's possession to her own, if she took possession and kept it. His charge was in these words:—

“It is said by the defendant's witnesses she entered and had possession for two years by actual residence. These two years would only make nineteen years' possession; I mean actual possession. But it is said she has kept the key of the house ever since, and has visited it every week of the time since then. If this be so, I cannot say a sufficient possession for twenty years has not been made out.

“The plaintiff denies this, and there is evidence she lived there for only two months after her brother's death, taking the possession not till three months or so after his death, and that she has been away from the place ever since, and that the property has been perfectly vacant.

“There is always difficulty about the precise or proper meaning of what is possession. In one case Mr. Justice *Erle* said, ‘possession has a hundred different meanings in the law.’ I think, if the plaintiff's evidence be relied upon, the defendant has not proved twenty years' possession; that is, actual possession, if that be necessary. I don't think, either, the evidence is very strong that Develin was in possession of the whole lot. The shanty stood on one corner of it, and the place was not fenced until a year ago.”

The jury were also directed that, if they found twenty years' possession complete for defendant, they should say whether they found such possession to be applicable to the whole lot, or to the shanty and the ground on which it stood.

It was objected for the defendant that the learned judge left it to the jury to say, whether at the end of Mrs. Kelly's possession for two years after her brother's death, she had abandoned the place, and that there was no evidence upon which to raise such a question.

In Easter term *M. O'Reiley* Q. C., obtained a rule *nisi* for a new trial, on the grounds—1. Of misdirection, in

the learned judge suggesting to the jury the question whether or not the defendant had abandoned the possession of the premises, there being, as she contended, no grounds, on the evidence, to raise a doubt on that point, except the fact that the defendant occasionally lived elsewhere than on the said premises, whilst she kept the dwelling house on the premises locked, kept the key of it, visited it weekly or oftener, and, during the whole of such time while not living in it, having certain furniture or chattels in the house which the defendant claimed, afforded no grounds for assuming or inferring that the possession was abandoned by her. 2. That the verdict was contrary to law and evidence, the defendant having proved a continuous possession of the premises for twenty years or upwards before the commencement of the action by herself, and those through whom she claimed, without payment of rent to, or written or other sufficient acknowledgment of title in the plaintiff, or those through whom he claimed.

The rule was enlarged until the present term, when *Freeman*, Q. C., shewed cause :—

The case was left to the jury as a question of fact on the conflicting evidence at the trial, and they were quite justified in their finding.

O'Reiley, Q. C., contra :—No one knew when Develin went into possession : it was clearly shewn that he was in such possession in 1842, and the title would be perfected in defendant, as his heir, in 1863. The evidence shewed she took possession immediately after Develin's death, and continued in possession, by keeping the key and keeping goods and chattels in the building until it was repaired, and she then resided there continuously for two years, which made the title complete in her at that time. After that she kept the house locked and articles of furniture in the place, and visited it from week to week until the possession was forcibly taken, about a year before the action was brought. Con. Stat. U. C. ch. 88, sec. 11, shews a mere entry by the owner would not prevent the statute running against him : *Doe d.*

Carter v. Barnard, 13 Q. B. 945; *Fanning v. Wilcox*, 3 Day. 258; *Cunningham v. Patton*, 6 Barr, 355; *Moffitt v. McDonald*, 11 Humphrey (Tenn.) 457; *Doe Drape v. Lawley*, 3 N. & M. 331.

RICHARDS, C. J., delivered the judgment of the court.

The learned judge, in his charge, had an impression that when the former owner entered in 1860 or 1861 on the premises, and broke open the door and found no one in possession, that such an entry might be sufficient to vest the possession in him for that time, and that from time to time as he and his agent went to the property and found no one, their entry might continue the possession. It does not appear that this point was left to the jury, or, if left, that it was objected to. If exception had been taken to this part of the charge, if actually delivered, the case of *Doe Bennett v. Turner* (7 M. & W. 226, and in the Exchequer Chambers 9 M. & W. 643), shews that the proper direction would have been that the taking forcible possession by the former owner before the expiration of twenty years was evidence of a termination of the tenancy at will which existed with Develin, and the jury might have been asked to say if a new tenancy at will had been created between the former owner and the present defendant, and, if so, the verdict for the plaintiff would have been right.

The objection taken by the defendant's counsel at the trial seems to point to the fact of an abandonment of possession by the defendant having been left to the jury. As we understand that part of the case, it was left to the jury to say whether the defendant had taken possession after Develin's death, and had continued the possession so as to make the whole period of both possessions twenty years continuously; and that if she kept the key of the house after she ceased to occupy it herself, and had visited it every week of the time since, he could not say a sufficient possession had not been made out.

There was evidence for the plaintiff that instead of occupying the place two years, as defendant's witness said she

did, she only occupied about *two months*: that she went to live there in the spring after Develin's death, and he died in January. No one lived on the place after she left it. The house was not fit for any human being to live in: another witness said it was not fit for a hog-pen.

If the jury gave full credit to the witnesses called for the defendant, they should have found for her as to the question of continuous possession for twenty years and upwards by Develin and herself; but if they did not rely on that testimony, and were satisfied, as a matter of fact, that after Develin's death she only retained actual possession for two months, and were not satisfied that she kept the key and left articles of value in the place, and visited it from time to time, then they were right in finding for plaintiff: it was for the defendant to satisfy the jury on that point. The fact that she did not live on the place all the time is established beyond reasonable doubt by the evidence. That she retained possession by locking the place, &c., as already remarked, was proved by her witnesses. The articles belonging to her, said to have been left in and on the place, were of very little value, and the only one spoken to by her own witness, that she recollected had been in the house all along and till Develin died, was a chest. One of plaintiff's witnesses also spoke of an old box being in the house, and all that was in it was not worth \$1.20.

If it was probable, from the evidence, that on a new trial the present defendant would be found entitled to recover a verdict for any part of the premises that would be of any considerable value, we might, on the question of the weight of evidence, grant a new trial; but, under the most favorable view of the case for her, we see little probability of any jury ever giving her a verdict for more of the lot in question than was covered by the shanty twelve feet by eighteen feet. There is nothing to shew that the remainder of the lot was ever used or occupied by Develin. It was not fenced until long after his death, and the former owner paid the taxes on it as a vacant lot: in that view of the case, plaintiff would be entitled to a verdict for much the larger portion

of the premises. And if the case were left to the jury, whether the entry by the former owner within a year after the death of Develin, and what then occurred, did not terminate the former tenancy, and create a new tenancy at will, under the view of the law as laid down in *Doe Bennett v. Turner*, we think it likely they would find for plaintiff.

We think we may sustain the verdict of the jury in this view, viz.; the plaintiff's paper title being admitted, it became necessary for the defendant to displace it, by shewing a continuous wrongful possession for twenty years. Against that title the evidence failed to shew an actual continuous occupation by persons being on the premises for the whole of that period. It was visited by the owner and his agents during that period when no person was living in the house. To shew it was, nevertheless, then in the possession of the defendant, she proved by one witness that she had locked the house and kept the key, and visited it from time to time. The learned judge said he could not say that was not keeping possession; and he left the whole question to the jury on the evidence, and they found for the plaintiff.

The point taken as misdirection does not seem to have been submitted to the jury, as the learned counsel thought it was, in taking the objection, and we do not feel that we can say there was a misdirection that was objected to at the trial.

Looking at all the facts of the case, and the really trifling interest the defendant could ever reasonably hope to establish a claim to in the premises, we think we ought not to protract this litigation between the parties by granting a new trial.

Rule discharged.

BANNERMAN V. DEWSON ET AL.

Ejectment—Joint action—Several possession—Incompetent witness.

The present Ejectment Act changed the mode of procedure rather than the law for the recovery of land, and therefore the right which prevailed under the old practice, to bring the action against all persons found in possession of land, without reference to whether their possession was joint or

several, still exists; and the disclosure by one that he occupies a part of the land claimed not jointly with another defendant, does not entitle him to have his name struck out of the writ, and oblige the plaintiff to proceed against the other alone; but the act provides a mode by which every one may defend, by limiting his defence to the particular part claimed; and where a joint action is brought against two parties found in possession of one lot, and their occupation is several, one is not thereby rendered a competent witness for the other.

Ejectment to ascertain the boundary between lots one and two, in the 4th concession of the township of West Gwillimbury.

The plaintiff was the owner of lot No. two, and he alleged that the defendants, who claimed lot one under Elizabeth Dewson, had encroached on his boundary. The encroachment, he alleged, was of different widths, and he claimed them under three descriptions. The southerly strip was 50 links wide, by 15 chains 70 links long. The next strip was $42\frac{1}{2}$ links wide, by 11 chains 90 links long; and the third strip was 45 links wide, and extended from the last strip to the centre of the concession. The last two were cleared. The first was bush land. The whole contained one acre, two roods and twelve perches.

The defendants both appeared, and denied plaintiff's title. Thomas asserted title in Elizabeth Dewson, under whom he claimed as tenant, to the parcel of land first described, and the northern portion of the land secondly described, as part of lot number one in the fourth concession, devised to her by the last will of Jeremiah W. Dewson, and also to the greatest part of the southern portion of the part secondly described, by virtue of over twenty years' possession by Elizabeth Dewson and those under whom she claimed.

Julius asserted title under Elizabeth in the same way as Thomas to the rest of the land claimed by plaintiff.

After the service of the writ, and on the 12th of April, 1866, a summons in Chambers was issued, calling on the plaintiff to shew cause why the writ of summons should not be set aside; or why the service thereof on the defendant Julius should not be set aside; for why the name of the defendant Julius should not be struck out of the writ, on

the ground that the defendants were not jointly in possession of any portion of the land described in said writ; and on the ground that service of the said writ had been accepted by the defendants' attorney only for Thomas.

Each of the defendants shewed that he claimed several portions of the land in dispute, and each denied joint occupation. Each swore that the other was a material witness for him, in maintaining his title to the several parts claimed by them.

On hearing the parties, Mr. Justice *Adam Wilson*, on the 20th of April, 1866, made an order discharging the summons.

The cause was brought to trial at the last spring assizes for the county of Simcoe. The case went to the jury on the questions of boundary and title by possession over twenty years; and the plaintiff had a verdict for the parts first and secondly claimed.

In Easter term *Robert A. Harrison* obtained a rule nisi, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection, in this, that the learned judge ruled that plaintiff was in a position to recover against defendants jointly in this action, though their occupation was several; and for rejection of evidence, in this, that the learned judge rejected the testimony of defendant Julius Dewson as a witness for defendant Thomas Dewson, and of Thomas Dewson as a witness for defendant Julius Dewson; or why the writ of summons herein, and all proceedings subsequent thereto, should not be set aside; or why the name of Julius Dewson should not be struck out of the writ and all subsequent proceedings, on the ground that the defendants were not jointly in possession of any portion of the several parcels of land described in the writ of summons; and on grounds disclosed in affidavits and papers filed; and why the order of *A. Wilson, J.*, discharging a judge's summons asking as last aforesaid, should not be rescinded, on the ground that

the said last mentioned summons should not have been made absolute; and on affidavits filed.

D. McMichael shewed cause, citing C. S. U. C. ch. 27, secs. 1, 2; *Cole Eject.* 75, 84, 83, and cases cited.

Harrison, contra, cited *Robinson v. Smith*, 17 U. C. 218; Ejectment Act, secs. 15, 21, 26; Consol. Stats. U. C. ch. 32; *Robinson v. Moffatt*, 1 Err. & App. 459; *Hall v. Yuill*, 2 Pr. Rs. 242.

WILSON, J.—We see no reason for setting aside the order which was made by the learned judge in Chambers.

The plaintiff found the tenants of the owner of the adjoining lot in possession of part of his lot, and he, in accordance with the first and second sections of the Ejectment Act (22 Vic. ch. 27), sued out a writ, addressed to the persons he found in possession. Each of them was at liberty to appear or not within the time appointed, and, besides denying the title of the claimant, had the right to assert title in himself, or in some other person under whom he claimed, according to the 8th section. By the 12th section any person appearing to the writ had the right to limit his defence to a part only of the property mentioned.

By the old practice ejectment might have been brought against all persons found in possession of land, or against every one in possession.

The Ejectment Act seems to recognize the same right; but it provides for the mode in which every one may defend, by limiting his defence to the particular part claimed; and the question at the trial is, whether the statement in the writ of the title of the claimant is true or false, &c.

The professed object of the application was, that each defendant should be in a position to be a witness for the other, and to effect this it was contended that, when one defendant disclosed that he occupied a part of the land claimed, not jointly with the other defendant, he was entitled to have his name struck out of the writ, and the plaintiff was obliged to go on against the other defendant in this action. But if one could make the application, the

other had the same right, and if both had made it at the same time the plaintiff would have had no defendant left, while both avowedly were on land to which he claimed title.

The defendants complain of misdirection in this, that the learned judge at the trial ruled that the plaintiff was entitled to recover against these defendants jointly, although their occupation was several; and for rejection of evidence, in not allowing Julius to be sworn for Thomas, and Thomas for Julius.

The defendants both claim as tenants of Elizabeth Dewson and in her right. They say the land in dispute is part of lot number one, and whether or not, she has had it over twenty years; and the questions were, whether one survey or another was the right one; and whether any part of the land in dispute had been in the possession of the defendants' landlord, and those under whom she claimed, over twenty years.

We have just declared, in reference to the other point taken in the rule, that these defendants were properly parties to this suit, and defendants on this record, and if so, were not competent to be witnesses one for the other. Nor can the verdict against both prejudice either; for in delivering possession the sheriff will remove each defendant from that part in which he finds him in possession, and will put the plaintiff in possession of his lot, as the jury have found.

The parties found in possession of land were trespassers as against him who had the right to possession, and the notice to appear was directed to one or all who were found in possession, that is, trespassing, under the law and by the practice as it stood before the 1st Vic. ch. 43. But this act changed the mode of procedure rather than the law respecting the recovery of land. The defendants could have been proceeded against under the old practice just as we find them here, and here, we think, the statute, Con. Stat. 22 Vic. ch. 27, sustains the plaintiff's proceedings, and, as incident thereto, the ruling of the judge.

As these defendants have stated their claims, that part

of the land secondly described is defended for by both, and the precise boundary of each defendant does not appear.

We refer to 3 *Bla. Com.* 199; *Adams on Eject.* 1, 15; *Tidd.* 9th ed. 1189; 1 *Chit. Prac.* 6th ed. 187; *Sel. N. P. Tit. Eject.*

The rule will be discharged.

Rule discharged.

WISEMAN V. WILLIAMS ET AL., EXECUTORS OF WILLIAMS.

Bond to execute a good and sufficient deed in law—Plea of execution of deed—Pleading.

To a declaration on a bond, whereby defendants' testator had bound himself or his heirs to "execute to plaintiff a good and sufficient deed in law" of the land in question, defendants simply pleaded that they, under a power in the will, had executed a deed of the land: *Held*, on demurrer, plea bad; for that by the words of the bond the obligor had bound himself to convey the land to plaintiff, and it was no answer to say that defendants had executed a deed, without shewing that they had conveyed the land to him; and, also, because it was not shewn that the heirs were parties to the deed, and that the defendants had therefore executed a proper deed.

Declaration on a bond that upon payment of £40 and interest on a certain day, the said J. T. W. or his heirs would execute a good and sufficient deed in law for the north-west quarter of lot number fourteen in the sixth concession of the township of Clarke, unto the plaintiff, his heirs and assigns, for ever: *Breach*, that the said J. T. W. in his life time did not, although requested so to do, execute a good and sufficient deed in law of the said land to the plaintiff, and further that the heirs of the said J. T. W. since his death did not execute a good and sufficient deed in law of the said land, as required by the condition of the said bond.

Second plea: That the said bond and condition were in the words set out in the said first plea, and that immediately after the making of the said bond the said John Tucker Williams gave possession of the said land to the plaintiff, and the plaintiff took possession thereof, as purchaser thereof from the said Williams, and had ever since continued in the

possession and enjoyment thereof; and that after the plaintiff had so taken possession, and while he was in possession of the said land, as such purchaser, the said John Tucker Williams departed this life, having first duly made and published his last will and testament in writing, duly executed so as to pass real estate in Upper Canada, whereby he appointed the defendants, together with John Knell Cotton, Edward Harris and James Scott, executors thereof, and empowered a majority of his said executors to give a good and sufficient conveyance of any part of his real and personal estate, and the defendants and the said James Scott, after the death of the said testator, and acting in pursuance and execution of the said power, executed to the plaintiff a deed in the words following: (setting out a deed in the common statutory form, with a covenant against their own acts).

D. G. Miller, for the demurrer.

C. S. Patterson, contra, cited *Burns v. Boyd*, 19 U. C. 547; *Smith v. Doane*, 15 U. C. 634; *Cully v. Winter*, 25 U. C. 34; *Toland v. Bruce*, 8 U. C. 14; *Doe Keogh v. Colhoun*, 1 U. C. 157; *Hyde v. Graham*, 1 H. & C. 593; *Sugden*, 13th ed. 286, and cases there cited.

J. WILSON, J., delivered the judgment of the court.

The question here is, whether it was the condition of the testator's bond that he should convey the land in the pleadings mentioned to the plaintiff in fee, or that he should only execute a deed, which would have conveyed it in case the title had been in the testator. The words in the condition are, "that in case the above bounden John T. Williams, or his heirs, shall execute a good and sufficient deed in law for the north quarter of lot number fourteen in the sixth concession of the township of Clarke, containing fifty acres, more or less, unto the said George Wiseman, his heirs and assigns for ever, then," &c.

Until within the last fifteen or twenty years a very common mode of making contracts for the sale of lands, the

title to which was still in the crown, was for the vendor to give to the vendee his bond that he would convey the land on a day therein named, provided the vendee in the meantime paid the vendor the purchase money at the times and in the manner expressed in the condition. Persons who prepared these bonds were not always acquainted with the precise meaning of the terms they used, and hence much of the litigation which has arisen upon them. If we are to look at the surrounding circumstances, and enquire what meaning the parties to these instruments attached to the words they used, we should have no difficulty in determining that the expression, "to deed" a piece of land, meant to convey it, and "to make a good and sufficient deed in law" for a piece of land meant a deed that would vest the title in the person to whom it was given.

In *Mouck v. Stuart* (4 U. C. R. 203) the words of the bond were, should "give and grant unto the plaintiff and his heirs a full and sufficient title or deed of conveyance for two hundred acres of land," &c., and it was held, that the defendant (the obligor) was bound to prepare the conveyance, and tender it executed to the plaintiff (the obligee).

In *Prindle v. McCan et al.* (4 U. C. R. 228) the condition was, that defendant should well and truly convey in fee simple the land specified to the plaintiff, his heirs and assigns, for ever; and here the plea was, that the defendant did make, seal and execute a conveyance in fee simple to the plaintiff of the said land; but it was held, that conveying the land was a very different thing from making, sealing and executing a conveyance of the land; and it was held that the obligor should himself tender to the obligee the conveyance executed.

In *McDonald v. Snitsinger* (5 U. C. R. 312) the condition was, that if the defendant, within three years from the date of the bond, should convey, or cause to be conveyed, a good and valid deed in fee simple in law to the plaintiff, at the expense of the plaintiff, then, &c.; and it was held, that it was incumbent on the obligor to prepare the deed.

In *Toland v. Bruce* (8 U. C. R. 14) the condition was,

“that the obligor, upon request, should execute a good and effectual conveyance of the fee simple of the land, free from all encumbrances.” It was held, that it was not the mere executing a deed, such as would be effectual if the grantor had a legal title, that would satisfy that condition.

In *Rogers v. Lake* (9 U. C. R. 264) the words were, that the defendant should “well and truly make and execute, or cause to be well and truly made and executed, a good and sufficient deed for two hundred acres of land, which is to be drawn by a U. E., then,” &c. It was held, that the obligor was bound to make a deed within a reasonable time, and that it was not necessary for the obligee to tender the deed.

As we read this bond, the obligor bound himself to convey this land to the plaintiff, and that it is no answer to say that his devisees executed a deed, without shewing that they conveyed the land to him.

But it is contended here that, if the deed set up in the plea did not convey the land, that this ought to have been replied. From the law, as laid down in these cases, the obligor can only discharge himself, by shewing he conveyed the land, which he does not do, and, as was said in *Prindle v. McCan et al.*, sealing and executing a deed is a very different thing from conveying the land.

In *Cully v. Winter* (25 U. C. R. 34) the Chief Justice said, “The defendant, to answer this part of the breach, ‘that he has not made a deed free from encumbrance,’ must necessarily plead performance, and then, if the plaintiff relies on the land being encumbered, he must shew how.”

But this does not apply in the case before us, for the answer to the breach for not conveying is, that the defendants executed a deed, without averring that by that deed they conveyed the land to the plaintiff; and the heirs of the testator are not parties to it. We think the plea does not answer the plaintiff’s breach. There will be, therefore, judgment for the plaintiff.

Judgment for plaintiff on demurrer.

LEYS AND WIFE V. MCPHERSON.

Construction of the married woman's act (Con. Stat. U. C. ch. 73)—The term marriage contract or settlement explained—The effect of knowledge of a person's solicitor stated.

The purpose of C. S. U. C. ch. 73 was to preserve to a married woman, for her own use, and as her own estate, all her own property which she had not disposed of expressly by a settlement, in like manner as if she had secured it by a settlement.

L., a few days before his marriage, executed to his intended wife a bill of sale of his furniture and household goods, and had it duly filed in the proper office. The bill of sale recited the intended marriage, and that it had been agreed that the goods should be assigned for the purpose of making some provision for the support and maintenance of the intended wife, and purported to be made in pursuance of the said agreement and in consideration of 5s :

Held, that the bill of sale was not a contract or settlement within the meaning of Cons. Stat. U. C. ch. 73, sec. 1, but was a valid transfer of the goods to the intended wife before marriage, and in consideration of it, and that her title to the goods was therefore, when the marriage took place, protected by the Statute, notwithstanding her coverture.

This was an appeal in an interpleader suit, tried before the Judge of the County Court of the United Counties of York and Peel, to determine whether certain goods and chattels taken in execution by the Sheriff of the said United Counties, under a *fiery facias* issued upon a judgment recovered by the now defendant against the said John Leys, were, at the time of the delivery of the writ to the sheriff, the property of the said Helen E. A. Leys, as against the now defendant.

John Leys, just before his marriage with his wife, the other plaintiff, and in contemplation of such marriage, entered into the contract herein mentioned ; and the question raised at the trial, and argued and decided in the Court below, and contended for before this Court was, whether the contract was a marriage contract or settlement within the meaning and operation of the Consolidated Statutes for U. C. ch. 73. If it were such marriage contract or settlement, then it was urged that the goods which were mentioned in and conveyed to Helen E. A. Leys were, notwithstanding the consideration of marriage, still liable for the husband's debts : they were in fact still his property, because such settlements were excluded from the operation of the act, and the goods

not having been the separate estate of the wife before her marriage, were not by the contract any part of her separate estate since the marriage, and the now defendant would be entitled to succeed ; but if it were not a marriage contract or settlement, then, it was contended, the goods were the separate estate of the wife before marriage, and were not liable for the husband's debts, and the result should be in favour of the claimants.

There was no dispute as to the facts. The following is a copy of the document in question, so far as it is material in this case :—

“ This Indenture, made the nineteenth day of August, in the year of our Lord, 1865, between John Leys, of, &c., of the first part, and Helen Emma Arthurs, of, &c., of the second part :

“ Whereas the said party of the first part is possessed of the goods, chattels, furniture, and household stuff herein set forth ; and whereas a marriage has been agreed upon, and is shortly to be had and solemnized between the said John Leys and the said Helen Emma Arthurs ; and whereas, upon the treaty of the said intended marriage, it was agreed that the said John Leys should, before the solemnization thereof, by conveyance to be made by him, make over and assign the goods, chattels, furniture and household stuff hereinafter mentioned, to the said Helen Emma Arthurs, for the purpose of making some provision for the support and maintenance of the said Helen Emma Arthurs :

Now, this Indenture witnesseth that, in pursuance of the said agreement, and in consideration of the sum of five shillings of lawful money of Canada, paid by the said party of the second part to the said party of the first part, he the party of the first part hath bargained, and by these presents doth bargain, &c., unto the said party of the second part, her executors, &c., all those the said goods, chattels, household furniture and stuff, as follows, &c., and all the right, title, &c. :

“ To Have and to Hold the said assigned premises, and all the rights, &c., of the party of the first part, unto and to

the use of the party of the second part, her executors, &c., as, to and for her sole and only use for ever."

The ordinary covenants for title and for quiet enjoyment were added.

The usual affidavits of execution and of *bonâ fides* were made, and the instrument was duly filed on the 23rd of the same month of August, in the office of the Clerk of the Counties of York and Peel, under ch. 45 of the Consolidated Statutes for U. C. The defendant's judgment was entered on the 13th of July, 1865.

At the trial, *McKenzie*, Q.C., for the defendant, objected:

1. That the paper produced, if anything, was a marriage contract, and therefore the claimant, Helen E. A. Leys, could not hold the goods in question under the Statute.

2. That she could not hold the property under a marriage contract made directly with herself: to enable her to hold it under a marriage contract, the property should have been conveyed to trustees for her separate use and benefit, and free from the control of her husband.

3. If she claimed to hold the goods under the Statute, she must shew either that she married without a marriage contract or settlement, or that the goods were her separate property unaffected by a marriage settlement or contract.

4. That any contract made in consideration of marriage was a marriage contract: if, therefore, the consideration here was a marriage intended, Mrs. Leys could not hold the goods in her own name; and if the consideration were not a marriage, there was no valuable consideration, and the sale was void against the defendant, as a judgment creditor of the husband.

5. By the Insolvent Act of 1864, sec. 8, sub-sec. 3, contracts made by insolvent debtors, with intent fraudulently to impede, delay, or obstruct their creditors, were null and void, though made in consideration of marriage, if made with the knowledge of the parties contracting. In the present case, the defendant was a judgment creditor, and writs of *feri facias* were in the sheriff's hands against John Leys when the writing in question was made, whereby all the pro-

perty was withdrawn from his creditors, in consequence of which the defendant had not been able to make his money, and this showed a fraudulent intent to impede creditors, on the part of John Leys.

6. That the situation of the parties and the character of the goods were such, that the law would presume that Mrs. Leys knew of her intended husband's position and intent: besides, he was then her solicitor to draw up the bill of sale, and his knowledge was therefore her knowledge.

7. The document also was void under sec. 18 of the Consolidated Statutes for Upper Canada, c 26.

Reference was made to *The Commercial Bank v. Cook*, 9 Grant, 537; *Re Colemere*, 12 Jurist N. S., 38,40.

A verdict was taken for the plaintiffs, with leave to the defendant to move to enter a verdict for him on all or on any of the points raised; and the court was to be at liberty to draw inferences of fact from the evidence as to the following questions:—

1. Whether the document was designed to defraud or impede creditors.

2. Whether John Leys was in insolvent circumstances and unable to pay his debts in full, when the document was signed.

3. Whether Mrs. Leys had knowledge of the circumstances of her intended husband, and of the intention which was imputed to him.

The defendant's counsel, in the following term, moved for and obtained a rule *nisi*, calling on the plaintiffs to show cause why the verdict entered for the plaintiffs should not be set aside and a verdict entered for the defendant upon the points before raised, in pursuance of the leave reserved, which rule, after counsel had been heard, was made absolute by the learned judge.

The learned judge stated that he thought the first class of objections taken fatal to the validity of the bill of sale; that the instrument was clearly a marriage contract in the nature of a settlement, and was not therefore within the protection of the statute, ch. 73; and the property conveyed to the female

plaintiff was, by the marriage and subsequent user by John Leys, reduced by him into his possession, and so became liable for his debts; that in other respects the bill of sale was a good conveyance, the consideration being marriage, and therefore a valuable consideration, which would prevent its being considered as a fraudulent conveyance or preference; that he thought sub-sec. 3 of sec. 8 of the Insolvent Act of 1864, was confined to cases where insolvency under the act ensued; but, at all events, the case was not one of an act done and intended with the knowledge of the person contracting or acting with the debtor; and he considered that, excepting as regarded the operation of the married woman's act, the bill of sale might be upheld; but, if the view he had taken with respect to it were correct, the bill of sale could not be supported, and the other objections became immaterial. He therefore directed the verdict to be entered for the defendant.

The plaintiffs appealed against this decision, and stated the following grounds of appeal:—

1. That the rule, calling on the plaintiffs to show cause why the verdict for the plaintiffs should not be set aside and a verdict entered for the defendant, should have been discharged, because the bill of sale passed the property or the goods in question to Helen E. A. Leys, and there was a valuable consideration, that of marriage, to support it.

2. The bill of sale, being the only contract or marriage settlement, and not providing in any manner for the disposition of the property, the plaintiff, Helen E. A. Leys, held the property as if no contract or marriage settlement existed.

3. The bill of sale was not a marriage contract or settlement within the meaning of the statute, the transfer of the property being absolute to Helen E. A. Leys, for the consideration (in part) of her marrying her then intended husband.

4. The statute (ch. 73) was remedial in its operation—favourable to married women, and should be construed liberally. The true meaning of the statute was that it should not be held to give a married woman control over property, the disposition of which was provided for by a

marriage settlement or contract, but that in all other cases the married woman should have the same rights as to personal and real property as a single woman.

In Easter term last, *M. C. Cameron*, Q. C., and *McMichael* for the appeal:—

Upon the execution of this instrument, the property in the goods passed at once to the grantee, Helen E. A. Leys. It was a valid transfer, the consideration being marriage. Before and at the time of the marriage the property was, therefore, in law the sole and separate estate of the female plaintiff. If it be a proper marriage settlement, it will stand independently of the statute. If it be not a proper settlement, it is within the protection of the statute.

J. Gwynne, Q. C., and *F. W. Kingstone*, contra:—

The U. C. Act, ch. 45, sec. 4, requires that *every* sale of chattels must be in writing, &c., and it must *not* be to defeat creditors. Here the effect—and from that the intent may be presumed—was to defeat creditors.

This is a contract or settlement of marriage within ch. 73: the document itself shows that it is so. It is stated to have been in consideration of *marriage*, and not in consideration of a *promise* of marriage. The case of *Chapman v. Bradley*, 9 Jur. N. S. 1046, 12 W. R. 140, referred to by the court, supports this view.

If this be a marriage settlement, the property, as there were no trustees, passed directly to the grantee, but not as her separate estate; and on the marriage it was vested again by law in the husband: *Fraser v. Thompson*, 1 Giff., 49, S. C. (in Appeal) 4 DeG & J., 659; *Bird v. Peagram*, 13 C. B., 639.

This was a voluntary conveyance until the marriage, and after marriage the grantee held the property by reason of the marriage contract; but, as before stated, such a contract cannot prevail against creditors, because it is expressly excluded from the operation of the statute: *Lett and wife v. The Commercial Bank*, 24 U. C. Q. B. 559; *Warden v. Jones*, 23 Beav. 497, 3 Jur. N. S. 456.

McMichael was heard in reply.

A. WILSON, J., delivered the judgment of the court.

The following sections of the act, ch. 73, are necessary to be considered.

Sec. 1. "Every woman, who has married since the 4th of May, 1859, or who marries after this act takes effect, without any marriage contract or settlement, shall, notwithstanding her coverture, have, hold and enjoy all her real and personal property, whether belonging to her before marriage, or acquired by her by inheritance, devise, bequest or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and from his control or disposition, without her consent, in as free and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding; but this clause shall not extend to any property received by a married woman from her husband during coverture."

Sec. 14. "Every married woman, having separate property, whether real or personal, not settled by any ante-nuptial contract, shall be liable, upon any separate contract made, or debt incurred, by her before marriage, such marriage being since the 4th of May, 1859, or after this act takes effect, to the extent and value of such separate property, in the same manner as if she were sole and unmarried."

Sec. 19. "Nothing in this act contained shall be construed to prevent any ante-nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this act had not been passed; but, notwithstanding any such contract or settlement, any separate, real, or personal property of a married woman acquired either before or after marriage, and not coming under or being affected by such contract or settlement, shall be subject to the provisions of this act, in the same manner as if no such contract or settlement had been made; and as to such property and her personal earnings, and any acquisition therefrom, such woman shall be considered as having married without any marriage contract or settlement."

It is impossible not to see that the purpose of this act was to leave settlements of marriage to their own special provisions and operation, and in all their integrity as they were before the passing of the act : they were not only not within its provisions, but they were to be, and are, expressly excluded from its operation.

Wherever there was a settlement, the property of, or which was settled upon, the wife, would be protected by the terms of the settlement, and in the manner expressly agreed upon by the parties to it. This the legislature well knew, and therefore it was neither desired nor desirable that these arrangements should be interfered with or defeated ; but, when there was not a settlement, the property of the wife, before that act, was, on her marriage, by the mere operation of law, absolutely diverted from her and transferred to the husband, so that he could squander it or give it away, or bequeath it in any manner he pleased, without or against her consent, just as if it had always been his property and had never been hers, and leave her quite unprovided for.

This the legislature also knew, and it was to provide against so extraordinary and unjust a state of the law that the act was passed, the purpose being to preserve to the wife for her own use, and as her own estate, all her own property which she had not disposed of expressly by a settlement, in like manner as if she had secured it by a settlement.

The effect of this act is to establish that independent personality of a *feme covert* concerning her own estate, which had long prevailed in courts of equity with respect to property settled to her separate use : *Woodward v. Woodward* (9 Jur. N. S. 882).

It is said, however, that this instrument is a marriage settlement, and therefore is not within the act ; but, at the same time, it is only admitted to be a settlement for the purpose of asserting that it has been defeated by the marriage, the very consideration which was designed to support it.

It has been decided that a promise of marriage is different from a promise in consideration of marriage ; for the former

is good by word only, the latter requiring a writing to support it; the former is between the persons who propose to intermarry, the latter is between them and others, or between others only.

And a marriage contract is said also to differ from all other agreements; for as soon as the marriage is had, the estate and capacities of the persons are altered; and as children are usually provided for, they become purchasers equally under the settlement with their parents, and are entitled to enforce their rights, although all the named contracting parties to the settlement agree to disregard it: *Harvey v. Ashley* (3 Atk. 610); *Rancliff v. Parkyns* (6 Dow. 208); *Lloyd v. Lloyd* (2 M. & Cr. 192.)

It may not be very easy, nor is it necessary, to give a legal definition of what a marriage settlement is. This may be better done by explanation than by definition—by stating what its purposes and effects are.

The purpose is, to secure a separate estate to the wife, and most usually also it is made for the benefit of the issue of the marriage, apart from the control or obligations of the husband; and this is accomplished, and until the passing of our statute, could only have been accomplished, by vesting the estate in some third person, as trustee for the wife, or wife and children. The effect of such a settlement, as they were commonly framed, and so far as concerns the wife, was to give her, substantially, the full exercise of all acts of ownership over the estate, as if she had been a *feme sole* and held the property in her own name. By such means she could sell the property, carry on trade with it, or dispose of it by will, because the trustee, in whose name the property was vested, held it for her use, and was obliged, within the provisions of the settlement, to do himself, and to permit her to do with the property whatever she pleased; and it was altogether exempt at law from the husband's debts.

No conveyance or contract, which did not permit these or such like powers to be exercised, or which did not preserve at law the estate from the husband, and from his liabilities, and for the wife apart from the husband,—which did not, in

fact, transfer the legal estate to some third person for her, was properly a marriage settlement.

If the legal estate were vested in the husband, there could not be said to be a proper marriage settlement ; but in such a case if there were a writing or articles, or if the husband had bound himself by conveyance or obligation to the wife before marriage by way of settlement, a proper settlement would be decreed, if it were necessary, to effectuate the intention of the parties.

If the husband, for instance, had given to his wife before marriage a bond for payment of a sum of money by way of settlement, this, under the former law, could not be held to be a marriage settlement, because the moment the marriage was celebrated the bond became again at law the property of the husband, or, to speak more correctly, was extinguished. In equity, however, the husband would not be allowed to avail himself of his legal discharge, but would be compelled to give to his wife the full benefit of the contract. The bond, in such a case, would not be the marriage settlement, but would more correctly be the articles or agreement for one.

In *Acton v. Pierce* (2 Vern. 480), the husband had given his wife, before marriage, a bond for £1000 : it was contended the marriage had extinguished it ; but the Court of Equity would not suffer such an answer to be made, and decreed to the wife the benefit of it, as a valid agreement ; and this is the established rule of the Court : *per Lord Eldon*, in *Prebble v. Boghurst* (1 Sw. 318).

I do not think, therefore, that this bill of sale was a marriage settlement in its usual and proper signification ; for it would be useless to call that a settlement for marriage which was to be determined by the very act of marriage, and at the very moment when it was required to be, and to begin to be, an efficient operating contract.

This Court is bound to know what a marriage settlement, securing the estate of the wife to her own separate use, is : it is recognized on many occasions at law ; and even as an

equitable instrument, this court is bound to know what its nature, purpose, effect and requirements are and ought to be: *Sims v. Marryat* (17 Q. B. 281.)

We think this instrument is in substance a grant made in consideration of marriage,—that it was good in law when it was made, and is protected therefore by the Statute upon the consummation of the marriage; and is good even as against creditors, because founded on a full consideration, marriage being said to be the most valuable of all considerations: *per Sugden, C. in Saunders v. Cramer* (3 Dru. & War. 87.)

In *Campion v. Cotton* (17 Ves. 263) a settlement in consideration of marriage was maintained against creditors, although the debtor was greatly indebted at the time, and although the intended wife knew that he was so, and although it was falsely recited that the property so settled had been bought with her money. The Master of the Rolls said :

“It is clear that, supposing the whole to have been the husband’s property, he might have settled it upon his marriage, according to the cases decided at law. Even the moveable effects might be so settled, and neither the joint possession which he had of the furniture, nor the want of an inventory, would invalidate it. It is clear, also, that the fact of his being indebted at the time, and of her knowing him to be so, would not affect its validity. Then, assuming the falsehood of the declaration, that the property had been purchased with her money, will that circumstance prevent her acquiring, as against him and those claiming under him, all the rights which the settlement acknowledged her to have, and professed to secure to her? I apprehend it to be clear, that the husband not only could not controvert her right to any part of the property, but was compelled to do whatever acts might be necessary to invest her with a complete title to it. He has expressly covenanted so to do, and the marriage was a sufficient consideration for the covenant. Then, how is it fraudulent against his creditors? The utmost they can make of this falsehood in the deed is, that the property was in truth his, though it was asserted to be hers ;

but if he could settle this property, and has done what bound him to give a title to it, supposing it to be his, how are they advanced by establishing that fact?

I do not think it can be inferred from the evidence that she knew he was in such circumstances as to make his bounty to her a fraud upon any one. While it was mere bounty, she could not have compelled him to complete her title by conveyance; but the moment the consideration of marriage intervened, it became matter of obligation upon him to give her all the title he himself had; and there is no proof of any such fraud in her as can prevent her receiving the benefit of that obligation. There is no ground, therefore, upon which his creditors can avoid the settlement in the whole or any part."

In this case then the bill of sale, founded on the consideration of the intended marriage, (*Saunders v. Cramer*, 3 Dru. & War. 87), was valid at law, when it was made to the intended wife; and by reason of this act, ch. 73, it was not divested out of her by the marriage and revested in the husband, as, it was held, was the case in *Acton v. Pierce*, under the law as it then stood.

It is noticeable, too, that the concluding words in the first section of the act are quite in accordance with this construction: they are—

"But this clause shall not extend to any property received by a married woman from her husband *during* coverture;" and that the expressions in sec. 14, in mentioning the wife's property, which is "not settled by any *ante-nuptial contract*," and in section 19 also, refer to that well known species of conveyances which was valid before the Statute, and was understood by every lawyer as a marriage settlement, and which, it is expressly declared, shall remain, notwithstanding the act, just as it did before the act, and as if the act had never been passed.

If the act is not to extend to any property which is received by a married woman from her husband *during* the coverture, it does, by inference and implication irresistible, extend to property received by a married woman

from her husband *before* coverture, and therefore it extends to this particular case; and if the act is to be read as maintaining ante-nuptial contracts valid before the act, and perfectly understood by such a designation, leaving them to their own proper effect and operation after the marriage, then this bill of sale by the husband to the wife herself before marriage was not such a contract as the act referred to.

It is of very little consequence, in fact, by what name it is called. Call it a marriage contract, but not such a one as the act contemplated; or call it by whatever other name can be given to it; it is and was, when it was made a legal document, capable of transferring the property contained in it to the intended wife, and that title which she so acquired was and is preserved to her by the statute, notwithstanding her coverture.

The present case is not within the statute of Elizabeth, as has been held from the earliest time to the present.

The case of *Clarke v. Wright* (6 H. & N. 871) may be referred to on this point, and it is not within our own act, which avoids conveyances as against creditors; nor is it within the Insolvency Act of 1864, sec. 8, sub-sec. 3, upon the short ground that there is no sufficient evidence that the intended husband made this contract with intent fraudulently to impede, obstruct or delay his creditors. But if this were proved, there is not a particle of evidence that this was "so made, done and intended with the knowledge of the person contracting or acting with the debtor."

The cases to which we were referred do not bear at all upon this case.

It has been contended that the female plaintiff had knowledge, by a constructive notice, that her husband fraudulently intended to impede and delay his creditors in their remedies against him, and so this contract, although made in consideration and contemplation of marriage, is void under the 27 & 28 Vic. ch. 17, sec. 8, sub-sec. 3.

Let it be assumed that her husband was an insolvent, and capable of being made so *in invitum* under this statute,

at the time he made this conveyance; what evidence is there that he made this contract with such a purpose? But let it be assumed, also, that he did make it with that intent; then, what evidence is there that she had knowledge of it?

It is said she had knowledge in law, or constructive notice of it, because, it is said, he was an attorney and solicitor, and drew this contract himself, and, as she had no professional adviser acting for her, it must be assumed that she had retained the co-plaintiff to represent her professionally, as well as himself.

The case of *Hewitt v. Loosemore* (9 Hare 449) determined that a mortgagor, who was a solicitor and who prepared the mortgage, the mortgagee employing no other solicitor, was to be considered the agent or solicitor of the mortgagee, but that it did not follow the mortgagee had constructive notice of a prior equitable mortgage, which the mortgagor had made, by reason of the deposit of the title-deeds with another. The Vice-Chancellor said, "Such notice would be constructive merely, and constructive notice is knowledge which the court imputes to a party upon a presumption so strong that it cannot be allowed to be rebutted that the knowledge must have been communicated"; and this decision was affirmed in 3 DeG. & J. 554.

The rule as to constructive notice has proceeded a great length, and perhaps not unjustly, but a good deal further than an unprofessional person could have supposed.

The rule is usually applied where the contest is between persons, each of whom claims a specific lien or charge upon the same property, as in *Sheldon v. Cox* (Ambl. 624); *LeNeve v. LeNeve* (3 Atk. 646); *Atterbury v. Wallis* (2 Jur. N. S. 1177).

I do not know that it can be used in this case for the purpose of avoiding this settlement, and making John Leys an insolvent, or amenable to insolvency proceedings: something more than the knowledge by John Leys should be required to charge the female plaintiff with the like knowledge on her part.

Notice of an act means knowledge thereof, or wilfully abstaining from acquiring such knowledge: *Bird v. Bass* (6 M. & G. 143).

Notice that a docket had been struck is not a notice of a prior bankruptcy: *Hocking v. Acraman* (12 M. & W. 170).

Upon the debtor being pressed by his creditor he said, "It will be of no use to you: I have committed acts of bankruptcy": *Held*, sufficient notice.—*Arthur v. Whitworth*, 6 Jur. 323. See also *Vidal v. Walton*, 14 M. & W. 254; *Hope v. Meek*, 10 Exch. 829; *Brewin v. Briscoe*, 2 El. & El. 116.

The attorney in the cause was told of a general assignment having been made, and that it would be impossible to carry out the trusts, and that the matter must end in a bankruptcy, as it did: *Held*, sufficient notice to the client. *Coleridge, J.*, said: "I by no means say that in every case notice to or knowledge of the attorney of a person will satisfy these words; but in the present case the notice was given to the attorney in the cause, when he was acting in it as such, he was the same agent who issued the execution, and, it should seem, in consequence of the information—in order to anticipate the fiat: under these circumstances, it is impossible to distinguish between him and his client:" *Rothwell v. Timbrel* (6 Jur. 691).

A notice of bankruptcy must, if given to the attorney, be served on the attorney himself, or on a clerk intrusted to act on such a communication in the absence of the attorney, and, therefore, such a notice delivered at the attorney's office in the same manner as a notice in a cause was not sufficient: *Pike v. Stephens* (12 Q. B. 465).

The term *notice* in the statute has reference not merely to executions but to dealings: per *Patteson, J.*, *ibid.* 472; and it would seem that notice to the attorney's clerk will not be sufficient, if he do not communicate it to the attorney: *Pennell v. Stephens* (7 C. B. 987); and so notice to the Sheriff, or to the officer in charge of the goods, is not notice to the execution creditors: *Ramsey v. Eaton* (10 M. & W. 22); and a notice left at the residence of the creditor is not an operative notice, until he has actually received it:

Christie v. Winnington (8 Exch. 287, 22 L. J. Exch. 212).

It is manifest that it is actual knowledge and notice that is necessary in this case, and not merely constructive notice.

But the evidence fails even to establish constructive notice, according to the principles laid down in *Kennedy v. Green* (3 M. & K. 719). It may be also that, even if the deed were void, it was avoided only for the objects of the Insolvent Act, and as no proceedings have been taken within the time limited by that act, that the deed can no longer be impeached.

It was stated by the defendant's counsel that the defendant had an execution in the Sheriff's hands against the goods of John Leys before and at the time of the making of this deed. There is no evidence of this: if there had been such an execution, it would of course have bound the goods in question, and been a prior claim to the one which has arisen by the conveyance in question.

We are not able, therefore, to adopt the decision of the learned Judge in the Court below upon the main point, for, we think, this instrument was not in itself "a marriage contract or settlement" at all, according to strict legal signification; but if it be a marriage settlement it is not such a settlement or contract as the act referred to or contemplated: if, however, it be a marriage settlement it is one which the statute supports. In any view of the instrument, we think, it was not only a valid legal instrument before the marriage, but that, by virtue of this statute, the subsequent inter-marriage did not avoid it, and it is now a subsisting legal instrument by virtue of which Helen E. A. Leys is entitled to hold and enjoy the property conveyed by it "free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued *sole* and unmarried, any law, usage or custom to the contrary notwithstanding."

The appeal, will, therefore, be allowed, and the order of this Court is, that the rule granted in the Court below, set-

ting aside the verdict for the plaintiffs and directing the verdict to be entered for the defendant, and the rule *nisi* also which was granted for that purpose, be respectively discharged.

Appeal allowed.

REGINA V. HALL.

Obstructing Highway—Authority of Commissioner of Crown Lands to open roads—Evidence of performance of Statute labour.

Held, quashing a conviction for obstructing a highway, that the Commissioner of Crown Lands has no authority to open roads on lands granted by the Crown, and any money expended for such purpose, under authority so given, is not public money within 22 Vic., ch. 54, Sec. 33; and the roads so opened do not, therefore, become public highways under that act.

It appeared from the evidence that statute labour had been performed on parts of the road in question, but only to a very limited extent, and not from time to time, so as to shew that it was a road “whereon the statute labour hath been usually performed:”

Held, not sufficient to establish the road as a public highway under the act above referred to.

THE defendant was convicted at the last Fall Assizes for the County of Grey, holden at Owen Sound, on the 17th day of October, 1866, on an indictment for obstructing a highway, described as being “*that portion of a certain road called The Toronto and Sydenham road, running through the old survey in the Township of Melancthon.*”

The Township of Melancthon lies at the south-east corner of the County of Grey, and adjoins the Township of Mulmer, in the County of Simcoe, on the east, and the township of Amaranth, in the County of Wellington, on the south, and the south-east angle of the township borders on the north-west angle of the Township of Mono, in the County of Simcoe.

It appeared at the trial that the first four concessions of the Township were laid out, and patents granted for some of the lots, long previously to the year 1848; that these four concessions were on the east side of the township, and ran about north and south; that they numbered from the east; that the lots numbered from the south; and that they were

known as the old survey of the Township of Melancthon, no other part of the Township having been surveyed until after the laying out of the road next mentioned.

In the year 1848 a government road, called the Toronto and Sydenham Road, was surveyed and laid out through the unsurveyed lands in the County of Grey, under the directions of the Crown Lands Department.

Mr. Rankin, the Surveyor, who laid out the road, was instructed to commence it at the western boundary or rear of the 4th concession of Melancthon.

At this time neither of the town lines to the east or south of the old survey, nor any of the concession or side lines south of the first six lots in the four concessions, had been opened, and Mr. Rankin, of his own accord, ran a compass line angling across lots through the four concessions, beginning on the front, at about the middle of lot No. 1 in the 1st concession (then and still owned by the defendant), and coming out near the north-west angle of lot No. 5, in the 4th concession, from which latter point the government road was surveyed and laid out four chains wide to Owen Sound, and was chopped out and cleared to that width. No road was laid out by Mr. Rankin through the old survey, but a wagon track or road, 14 feet wide, following the compass run by Mr. Rankin, as nearly as the ground would conveniently admit of, was cut out through the four concessions under the superintendence and directions of Mr. Snyder, the government local agent, at the expense of the Crown Lands Department, and this track was used as a road from 1849 up to a recent date. Some statute labour was performed on part of it, and part of the road was also, subsequently to 1849, cut out to the width of 66 feet, at the expense of the municipality.

A few years since, the County Council of Grey made a gravel road of the Toronto and Sydenham Road, and they used that part of the road between the 4th and 3rd concessions as far as the concession road between the 2nd and 3rd concessions, gravelling it up to that point, and then gravelled the concession road from that point south to the county line.

Since 1849 the town lines between the old survey and Amaranth, and between the old survey and Mulmer, from lot No. 1, inclusive, to lot No. 10, and the side line, between lots Nos. 5 and 6, through the 1st and 2nd concessions, and the concession line between the 1st and 2nd concessions, for the whole of the width of lots Nos. 1 and 2, and the concession line between the 2nd and 3rd concessions, from No. 1, inclusive, to lot No. 5, inclusive, (being all government allowances for roads) had all been opened and used as public roads.

In the Spring of 1865, the defendant obstructed the wagon track or road before mentioned, where it passed through his lot No. 1 in the 1st concession, by placing two rail fences across it, and it was for this obstruction that he was indicted as aforesaid. The case turned upon the question, whether the track or road, where the obstructions took place was a public highway. On the part of the prosecution it was claimed to be a highway under section 313 of the Municipal Act,

1. Because public money had been expended for opening it, and because the money expended by the government, and that expended by the municipalities, were both public moneys within the meaning of that section.

2. Because it was a road (as was contended) whereon the statute labour had been usually performed.

It was also contended that there was evidence of dedication by the defendant.

The case was left to the jury only on the question of dedication, and they were directed to render a verdict for the Crown, it being understood and agreed by all parties that, in case the jury found there was no dedication, the case was to be reserved for the opinion of the Court of Common Pleas.

The jury found there was no dedication, and a verdict of guilty was then rendered against the defendant, as previously directed.

Judgment was deferred until the next assizes for the County of Grey, and the question was reserved for the con-

sideration of this Court, whether upon the evidence the road or track, where the obstructions took place, was a public highway under section 313 of the Municipal Act, and whether the defendant should have been convicted.

Lane, for the defendant, cited *Regina v. Plunkett*, 21 U. C., 536.

K. McKenzie, Q. C., contra, cited *Regina v. Hunt*, 16 C. P. 145; *Spalding v. Rogers*, 1 U. C. 135; *Regina v. G. W. R. Co.*, 21 U. C. 555.

J. WILSON, J., delivered the judgment of the court.

The question is, whether this is a road under the 22 Vic., ch. 54, sec. 33, which provides for what constitutes highways, and, among other things, declares "that any roads, whereon public money has been expended for opening the same, or whereon the statute labour hath been usually performed, shall be deemed common and public highways."

First: Has public money been expended for opening the same? Mr. Rankin, a P. L. S., was authorized to open a road through the unsurveyed lands of the Crown north-west-erly from the fourth concession of the Township of Melancthon; but he found that there was no direct road to connect this with the road through Mono and the corner of Mulmer. For his own convenience, and to get his provisions through, he ran a compass line and blazed through the first four concessions of Melancthon, beginning on lot 1 in the first concession, on which lot is the road mentioned in the indictment as having been shut up by the defendant. The then Commissioner of Crown Lands being on the ground, directed Mr. Snyder to open it, as a continuation of road laid out on the unsurveyed land. He cut it out only through the surveyed lands, as a bush road, 14 feet wide. The other was cut out 66 feet, and he made some cross ways to make it passable for waggons. It is the money thus expended, and some little contracts given out for work upon it by the municipality afterwards, that make it a public road, as the prosecutor contends.

We do not see that it was public money in this way expended, which the act contemplated as establishing a public highway. The Commissioner of Crown Lands has no authority to open roads on lands which the Crown has granted; but if he could expend money, in the very act of trespass, in spending it, he would thus be able to do what the law has not authorized.

Before the union of these Provinces, the Legislature made grants of money to be expended upon roads, and the Commissioners named in these acts usually expended it. The origin of the establishment of roads, by the expenditure of public money upon them, obtained in this way. We guard ourselves from deciding here that the expenditure of public money through other channels may not establish a road; but we determine here that money, directed to be expended in the way this case discloses, was not public money within the meaning of this clause.

Nor do we think that the expenditure here shown by the municipal authorities, and the statute labor done upon the other parts of this road, establish the road on this defendant's land.

Where a road has been used as a public highway, and the usual statute labor of the locality done upon it from year to year, we should hold, in the absence of explanation, that this established the road as a public highway. It is true that statute labor has been done upon parts of it, but only to a very limited extent, and not from time to time, so as to show that it is a road "whereon the statute labor hath been usually performed." The mere performance of statute labor on a road will not establish it (for a crafty overseer of highways might do this), but the usual performance of it from year to year, in maintaining it for the use of the public. The evidence fails to show this, and, therefore, it cannot be established on this ground. It appears to us, that the only ground on which its establishment could have been maintained was dedication, of which there was evidence, but which the jury negatived.

We therefore think the verdict should be for the defendant.

Judgment accordingly.

MERNER V. KLEIN.

Sale of goods—Original liability—Evidence—Promise to pay not in writing—Statute of Frauds—New trial.

Plaintiff by an instrument under seal agreed with S., for whom defendant was guardian, S. being then under age, for the sale to him of his tools and stock-in-trade, and the good-will of his business, as a tinsmith, and S. gave plaintiff an order on defendant for payment out of moneys in his hands belonging to him. It was proved that plaintiff went to defendant's shop about two days before S. got the goods and asked him whether he would pay for them if plaintiff delivered them to S., stating that he would not deliver them unless defendant would do so. Defendant replied he would say nothing about it until S. and plaintiff were both present. On the following day, before the sale of the goods, an entry was made in defendant's pass book, used for entering daily sales, that S. had bought of plaintiff the goods in question at the price agreed upon. On all three meetings defendant asked S. if it was all right, and he was to pay the amount to plaintiff. S. said, yes. Defendant said he could give plaintiff some money then and would pay him the balance again. On this plaintiff said he would let S. have the goods, of which the latter immediately took possession. A witness stated that he understood plaintiff was to look to defendant for payment, and that the goods had been bargained for between plaintiff and S. before he went to defendant to ascertain if he would pay for them. Another witness testified that plaintiff's clerk told him defendant was charged in plaintiff's books: that the goods were so charged to S. on the day of the sale, or the day after; that he had seen this charge, but did not know to whom the goods had been sold: it did not, however, appear that this entry had been made at the time of the transaction, or with defendant's knowledge. An account was, also, proved in the handwriting of plaintiff's clerk, charging S. with the goods. Subsequently S. directed defendant not to pay plaintiff the amount of the account:

Held, that, setting aside the question of infancy, there was no evidence of original liability on the part of defendant, or his property, for the price of the goods, but that the only liability which arose was from the promise of defendant to pay plaintiff the amount, and this promise was not in writing, and was therefore void under the Statute of Frauds. But, as the point suggested on the argument, that S., being an infant, could not be primarily liable, and defendant must be, was not taken at the trial, the court granted a new trial, costs to abide the event.

Declaration, on the common counts, for goods bargained and sold by plaintiff to defendant; goods sold and delivered by plaintiff to defendant; for the good-will of a business of plaintiff sold and given up by plaintiff to defendant; and on the account stated.

The second count stated that defendant, having money of one Stauck in his hands, it was agreed between plaintiff and defendant and said Stauck that plaintiff should sell and deliver goods to Stauck to the amount of \$879.36; that defendant should, on the order of Stauck, pay plaintiff therefor, and Stauck should discharge defendant from his

liability to him, to the extent of the said sum ; that defendant, in consideration of the agreement, promised plaintiff to pay him said money ; and that plaintiff sold and delivered the goods to Stauck, and Stauck by order directed defendant to pay plaintiff the said sum of money ; yet defendant did not pay plaintiff the same, or any part thereof, to plaintiff's damage of \$1,000.

Defendant pleaded—

1. To 1st count, never indebted.

2. To second count, that he did not promise as alleged.

3. To second count, that he was on 10th October, 1862, pursuant to the statute, appointed guardian to the said Stauck and others infant children of Jacob Stauck by the Surrogate Court of the county of Waterloo ; that the money of Stauck in his hands was held as such guardian, and was the distributive share of said Stauck of the estate of his father ; that at the time of making the agreement and giving the order Stauck, as plaintiff well knew, was an infant within the age of twenty-one years, and before he attained the full age of twenty-one, and after he attained such age, and before defendant accepted said order, or in writing became liable to the plaintiff for the payment of said money, or any part thereof, and before the commencement of this suit, said Stauck repudiated the said contract or agreement and order in writing and gave defendant notice not to pay plaintiff the said sum of money, or any part thereof, and did not, nor would discharge defendant from liability to him to the amount of the said sum, or any part thereof, of all which plaintiff had full knowledge and notice.

The plaintiff joined issue on all of defendant's pleas.

The cause was tried before *A. Wilson, J.*, at the last assizes for the county of Waterloo.

It appeared at the trial that one Stauck, for whom defendant was guardian (he not then being twenty-one years of age), bargained with the plaintiff for the purchase by him of his tools and stock-in-trade, and the good-will of his business, as a tinsmith. The bargain appeared to have been made

some time about the 24th of January last. An agreement under seal between them of that date was produced at the trial, and an order from Stauck on defendant, in favor of plaintiff, for the payment of the purchase money, dated the same day, was also put in. A witness was called for the plaintiff, who proved that plaintiff came to defendant's shop about two days or so before Stauck got the tin ware, and asked defendant if he was willing to pay for the stock if he let plaintiff have it, saying he would not let Stauck have it unless defendant would pay for it. Defendant said he would say nothing about it until Stauck and plaintiff were both present. Next day, before the sale of the tin ware, an entry was made in a pass-book of defendant's used for entering charges of sales in the course of the day, dated 31st January, 1866, as follows :—

“DANIEL STAUCK, bought of SAMUEL WARREN :

To tin ware	\$879 36
One hundred of in goods.....	100 00
Balance in money.....	779 36.”

When all three were together defendant asked Stauck if it was all right then, and whether he was to settle or pay the amount to the plaintiff or not. Stauck said, “Yes.” Defendant asked the amount. Either plaintiff or Stauck said \$879.36. Defendant said to plaintiff he could give some money then, if he wanted it, and notes which he could collect. Plaintiff said *no*; he did not want the notes, he did not need the money just then. Defendant said he would pay the amount to the plaintiff. After that plaintiff said, “Now I will let Stauck have the goods.” Immediately after this Stauck took the articles purchased, hired another place of business, and kept it open about a week. The witness understood plaintiff was to look to Klein for the payment of the goods, and that the goods had been bargained for between plaintiff and Stauck before they went to defendant's to know if he would pay for them.

Another witness for plaintiff said plaintiff's clerk, who was not called, told him defendant was charged in plaintiff's books: he said goods were charged in plaintiff's books to

defendant the same day the goods were sold to Stauck, or the day after. He saw the charge against the defendant in plaintiff's book : he did not know to whom the goods were sold.

This same witness proved an account, dated 31st January, 1866, in the handwriting of plaintiff's clerk, which was put in at the trial. It commenced as follows :

“ *New Hamburg, January 31st, 1866.*

“ MR. DANIEL STAUCK

1866.

To SAMUEL MERNER.

January 31.	To tin ware	\$166 24
	Tools	400 00
	Scale, stoves and show case	20 00
	Including other articles.	

The whole making a total of \$879 36.”

By the agreement under seal between plaintiff and Stauck plaintiff agreed not to manufacture any tin ware for five years. A few days after the bargain, about 12th February, Stauck, who was not, when the purchase was made, twenty-one years of age, notified and ordered defendant not to pay the plaintiff the amount of the account, and left that part of the country. He had previously offered back to plaintiff the articles purchased from him, contending he ought to take them back, as the plaintiff had commenced work again, contrary to his agreement. This plaintiff refused to do.

At the close of the case the learned judge thought there was no evidence he could leave to the jury of an original liability on defendant's part. The charging the defendant in his (plaintiff's) books with the articles sold was not shewn to have been done at the time the transaction was entered into, nor to have been done with defendant's knowledge. The order of Stauck on defendant ; the invoice of the plaintiff charging Stauck ; the copy from the defendant's book produced by the plaintiff ; and the agreement under seal between plaintiff and Stauck ;—all shewed the sale, the primary transaction, to have been between the plaintiff and

Stauck, and that the defendant was not the purchaser, but the person who guaranteed the payment of the goods, and there was no promise in writing to bind him; and that, infancy out of the question, plaintiff, from anything that appeared on the trial, could still sue Stauck for the goods.

The plaintiff's counsel declined to take a non-suit after the opinion expressed by the Judge, who directed the jury to find a verdict for the defendant.

The question, that the infancy of Stauck might make a difference as to defendant's liability, did not impress itself on the mind of the learned Judge, nor did the plaintiff's counsel suggest the point, nor call the attention of the learned Judge to it, with a view to his charging the jury, or deciding on that view of the case.

The jury, under the direction of the learned Judge, found a verdict for the defendant.

W. Bowlby now obtained a rule *nisi* to set aside the verdict as contrary to law and evidence; and for misdirection, in telling the jury there was no evidence for their consideration; and in not leaving it as a question of fact to the jury to say whether the credit was not given directly to the defendant, and not to Daniel Stauck, the evidence shewing that the plaintiff was to look to the defendant for payment, and that the defendant himself promised to pay directly; or for a new trial, the verdict being contrary to law and evidence; and on the ground that Stauck was an infant and not liable at all, and so the defendant's promise could not be collateral, as a matter of law, but direct and original.

During the term *Miller* shewed cause:—

The undertaking of the defendant was merely to pay the debt of another, and whatever doubts there may have been at one time, it is now settled that if the original purchaser is liable, then the person guaranteeing cannot be.

The evidence of the plaintiff at the trial did not shew Stauck to be an infant, and that defence in general can only be set up by special plea; and it does not therefore

appear certain that if Stauck were sued he would plead infancy.

Substantial justice has been done between the parties, and the court will not now interfere.

He cited *McKenzie v. McBean*, 4 O. S. 137; *Hall v. Shannon*, Easter Term, 2 Vic.; *McMahon v. Campbell*, 2 U. C. Q. B. 158; *Harris v. Huntbatch*, 1 Burr. 373; *Edes v. McGregor*, 8 C. P. 260; *Turley v. Grafton Road Co.*, 8 U. C. 579; *Kennedy v. Freeth*, 23 U. C. 92.

M. C. Cameron, Q. C., contra :—The question as to whom the credit was given was one for the jury, and on the evidence they might have found that defendant was primarily liable. The defendant having promised, (Stauck being an infant) was clearly liable; because the infant himself not being liable, these articles not being necessities, the promise of defendant was not to pay the debt of a third person. The case referred to in 1 Burr., and *Birkmyr v. Darnall*, 2 Ld. Raymond 1085, are both express authorities for plaintiff on this point. (He also referred to *Addison* on Contracts, 37).

RICHARDS, C. J., delivered the judgment of the court.

In the notes to *Forth v. Stanton* (1 Williams' Saunders 211 a) the law is thus laid down: "A distinction was formerly taken between a promise for the payment of goods, &c., for another *before* and *after* the delivery. The former was held to be an original undertaking and so not within the statute, but the latter was a collateral undertaking, and therefore within the statute. But this distinction has been since over-ruled, and the construction now is, that if the person, for whose use the goods are purchased, is *liable at all*, any promise by a third person, upon sufficient consideration, to pay that debt must be in writing." The concluding part of note 1, on p. 211 e, states the law as follows: "There is considerable difficulty in the subject, occasioned, perhaps, by unguarded expressions in the reports of the different cases; but the fair result seems to be,

that the question, whether each particular case comes within this clause of the statute (the 4th) or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

This last statement of the law is approved of by *Cockburn*, C. J., in *Fitzgerald v. Dressler* (7 C. B. N. S. 375), and though the other Judges of the Court did not agree with him as to the final decision of the case, they all concurred on the point relative to the Statute of Frauds.

If this view of the law be correct, then it seems to be very clear, on the evidence, that neither the defendant (putting the question of infancy aside) nor his property were in any way liable in the transaction, except the liability that arose from the promise of defendant to pay the plaintiff the amount; and therefore the view of the learned judge at the trial, that the evidence would not sustain a verdict for the plaintiff, on the ground of defendant's original undertaking and liability, seems correct.

In *Reader v. Kingham* (13 C. B. N. S. 344) many of the cases in relation to the section of the statute now under discussion are referred to and commented on. *Lee et al. v. Mitchell* (23 U. C. Q. B. 314) is one of the latest cases in our own courts.

Some of the doctrines laid down in *Anderson v. Hayman* (1 Hy. Blackstone 120) will apply to the present case. The marginal note of the case is: "A tradesman delivers goods to A., at the request and credit of B., who says before the delivery, 'I will be bound for the payment of the money, as far as eight hundred or a thousand pounds.' This promise of B., not being in writing, was void by the Statute of Frauds, as it appeared that credit was given to A. as well as B." The learned Judge directed the jury, if the credit was given to defendant alone to find for plaintiff; but if any credit had been given to A., his son, the promise not being in writing was void under the Statute of Frauds. A verdict was found for defendant. On a motion for a new

trial, the court were of opinion that the promise, not being in writing, was void by the Statute of Frauds, as it appeared from the evidence of the letter to defendant's son, who had been applied to by plaintiff for payment, that credit was given to him as well as the defendant.

The point now suggested, that Stauck, being an infant under twenty-one years of age, could not be primarily liable, and under the authority of *Harris v. Huntbatch* and *Binkmyr v. Darnall* that the defendant must be, was not taken at the trial, nor was the attention of the learned judge called to that view of the case. We think, therefore, there should be a new trial, that the whole matter may be submitted to the jury on a full view of the law and of the facts.

The defendant gave some evidence at the trial with the view of showing that he did not intend to make himself primarily liable at all, and that the undertaking really was that, if after Stauck came of age he directed him to pay over the money, he would do so, but until that time he was not to be bound at all.

*Rule absolute for new trial, costs to
abide the event.*

REGINA V. ATKINSON.

Conviction for perjury—Ambiguity in affidavit—Absence of venue in jurat—Presumption as to place where affidavit sworn—Evidence—23 Vic. ch. 2, sec. 28.

A joint affidavit made by the defendant and one D. stated * * “Each for himself maketh oath and saith, that, &c.; and that he this deponent is not aware of any adverse claim to or occupation of said lot.” The defendant having been convicted of perjury on this latter allegation, *Held*, that there was neither ambiguity nor doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot.

To sustain a conviction for perjury it is not necessary that the jurat of the affidavit, upon which the perjury is assigned, should contain the place at which the affidavit was sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material.

In the affidavit in question here there was no statement as to where it had been sworn, either in the jurat or elsewhere, except the marginal venue, “Canada, County of Grey, to wit;” but the contents shewed that it related to lands in the County of Grey, and it was proved that defendant subscribed the affidavit, that the party before whom it purported to have been sworn, was a justice of the peace for that county, and had resided there for some years, that the affidavit had been received through the post office by the agent of the Crown lands there, by whom it was forwarded to the Commissioner of Crown Lands, and that subsequently a patent for the lot issued to the party on whose behalf the affidavit had been made: *Held*, evidence from which it was to be inferred that the affidavit was sworn in the County of Grey, and that the jury had properly so inferred.

Held, also, that if the affidavit was sworn in the County of Grey, the proof of the swearing by the justice of the peace, and the taking of the oath by the defendant, were made out by proving their signatures.

The provision of the 23 Vic. ch. 2, sec. 28, that all affidavits required thereunder may be taken before “any justice of the peace,” does not empower a justice of the peace to administer the oath anywhere in the Province: it merely authorizes him to do so in the place in which he acts as such justice.

The same interpretation of the act applies to commissioners for taking affidavits mentioned therein.

The defendant was convicted at the last fall assizes for the County of Grey, holden at Owen Sound before *S. Richards*, Q. C., sitting for the Chief Justice of this Court, on an indictment for perjury, charged to have been committed in an affidavit made by him before John Walter, a justice of the peace for the said county, concerning and in respect of a claim made to the Crown Lands Department for the granting of lot No. 9, in the 8th concession of the township of Holland, to one John Cunningham.

The prosecution was under the statute 23 Vic. ch. 2, sec. 28.

At the trial a document was produced and filed as the affidavit in which the perjury was committed, which document was partly printed and partly written, and was as follows :

“ CANADA, } John Atkinson, Patrick Dwyer,
 “*County of Grey, to wit :* } of the township of Holland, both
 to wit : } maketh of Holland, in the County
 of Grey, and both maketh oath of the township of
 in the county of each for himself maketh oath, that
 they is well acquainted with lot No. nine in the eighth con-
 cession of the township of Holland ; that it is now occupied
 by the said John Cuninton, and has been continuously
 occupied by him for last ten years last past ; that there
 are three acres of it cleared and had under crop, and
 a habitable house feet by feet erected on the
 same ; that these improvements were made by and on behalf
 of ; and that he this deponent is not aware of any
 adverse claim to or occupation of said lot.

“ The said John Atkinson and Patrick Dwyer further maketh oath and sayeth, that the said John Cunninton lives on No. eight in the ninth concession of the township of Holland, upon which he have cleared upwards of 70 acres which he have a good log house and suitable buildings.”

“ Sworn before me at
 this 18th day of February, 1865, } JOHN ATKINSON.
 JOHN WALTER, J.P. } PATRICK + DURIE.”

“ This affidavit is made under the 28th section of 23 Vic. ch. 2.”

It was proved that the signature *John Atkinson* subscribed to the last mentioned document was in the handwriting of the defendant or party indicted, and that the signature “ *John Walter, J.P.*,” subscribed to what purported to be the jurat to the said document or affidavit, was in the handwriting of John Walter, who before and on and subsequently to the 18th February, 1865, was a justice of the peace for the said county. The said John Walter was not called as a witness, he being unable to attend the trial. It was further sworn that the said John Walter and the said John Cunnig-

ton and the defendant all resided in the County of Grey at the date mentioned in the jurat and for some years previously, and that the said document or affidavit was received by the Crown Lands Agent for the County of Grey in the month of March, 1865, through the post office, but from whom was not shewn, and that he forwarded it to the Crown Lands Department, and a patent for the said lot subsequently issued to the late John Cunningham. No other evidence was given as to the taking or making of the affidavit, or as to the county or place in or at which it was sworn, than is hereinbefore stated. Other evidence was given to shew the falsity of the statements in the affidavit on which the perjury was assigned.

At the close of the evidence for the prosecution the defendant's counsel contended that the case was not made out against the defendant, and he raised the following objections:

1st. That the only assignment of perjury, on which the indictment could be sustained, was that on the allegation that the defendant was not aware of any adverse claim or occupation of the lot, and that the affidavit produced did not support the indictment in this, that it was an affidavit made by two parties, and the words deposing as to there not being any adverse claim were, "and that he this deponent is not aware of any adverse claim or occupation of said lot," leave it uncertain which deponent is intended, and it is uncertain whether defendant ever did depose as charged in the indictment.

2nd. That there was no place stated in the jurat shewing where the affidavit was sworn, and that if the affidavit were taken out of the County of Grey the indictment would not be sustained, because the magistrate before whom it purported to be sworn was only sworn to have been a justice of the peace for the County of Grey, and would have no jurisdiction to take an affidavit out of that county.

3rd. That, even as a matter of venue, the Crown was bound to shew that the affidavit was sworn in the County of Grey, and there was no evidence where the affidavit was made, and no place stated in the jurat shewing where it was sworn.

4th. That the taking or making of the affidavit was not sufficiently shewn, there being no proof of anything more than the signature of the magistrate to the jurat and the signature of the defendant to the affidavit.

The learned Queen's Counsel overruled the objections, but decided to reserve the questions for the opinion of this Court, in case the jury convicted the defendant. The case was left to the jury, and, as the first objection, applied only to one of the statements on which the perjury was assigned, they were requested, in case they found the defendant guilty, to state whether they found all or any and which of the statements to be untrue, and whether defendant knew them to be so when the affidavit was made.

The defendant was convicted, and the jury stated that they found all the statements on which the perjury was assigned to be severally untrue, and to have been known by the defendant to be so at the time of the making the affidavit.

On such conviction the learned Queen's Counsel reserved the questions of law raised by the four objections above mentioned, and the question whether, on the facts hereinbefore stated, the defendant ought not to have been convicted, for the consideration of this Court, and postponed judgment until such questions should be considered and decided; and the defendant was admitted to bail to appear at the next sittings of the Court of Oyer and Terminer, to be holden in and far said County of Grey, to receive judgment.

Lane, for the defendant, cited *Burns' Justice*, 29th ed. vol. 3, p. 1000; *Chy. Cr. Law*, 2nd ed. 2 vol. 312 b.

K. McKenzie, Q. C., and *Robert A. Harrison*, contra, cited *Rex v. Emden*, 9 Ea. 437; *Rex v. Taylor*, Skyn. 303; *Rex v. Morris*, 2 Burr. 1089; *Rex v. Benson*, 2 Camp. 508; *Rex v. Spencer*, Ry. & Moo. 97; *Arch. Cr. Pl.* 15; *Rex v. Catesby*, 2 B. & C. 314; *Rex v. Whitchurch*, 7 B. & C. 573; *Rex v. Upton*, 10 B. & C. 807;

Chesterton v. Farlar, 7 A. & E. 713; *Hall v. Maule*, 7 A. & E. 721; *Hallack v. University of Cambridge*, 1 Q. B. 593, 614, 615.

J. WILSON, J. delivered the judgment of the Court.

We think there is nothing in the first objection. The affidavit in substance is, that the deponents, each for himself maketh oath that he is not aware of any adverse claim to, or occupation of, said lot, the lot in question before the Commissioner of Crown Lands: there is neither ambiguity nor doubt in what each deponent says.

The second objection in fact is, that there is no place stated in the jurat where the affidavit was sworn: the rest of the objection is argument.

The third is, that the Crown was bound to shew that the affidavit was sworn in the County of Grey, and there is no evidence where it was made, and no place in the jurat shewing where it was sworn.

The fourth is, that the taking or making of the affidavit was not sufficiently shewn, there being no proof more than the signature of the magistrate to the jurat and the signature of the defendant to the affidavit.

The margin of the affidavit at the top contains these words:

“Canada, County of Grey, to wit.”

The venue of legal proceedings is intended to shew where the principal facts and circumstances in the proceedings occurred, or were alleged to have occurred, with a view to shew that, the Court and jury have jurisdiction in the matters. As long as the jurors were required to come from the immediate neighborhood or visne of where the facts they were sworn to try occurred, the immediate visne was stated with every material fact that was alleged. When it became no longer necessary that they should come from the visne, but from the county, then the fact was alleged to have occurred at a given place, to wit, at A. in the county of B., to give the jurors who came from the body of the county jurisdiction to try the fact. At the present time the venue is referred to, as shewing that the Court and

jury have jurisdiction to try the facts, as having occurred in the county or union of counties indicated by the venue in the margin of the proceeding, civil or criminal.

Until the 18 Vic. ch. 92, it was necessary to state in the indictment the venue expressly, or by reference to the venue in the margin to every material allegation ; but that statute enacted that it should not be necessary to state any venue in the body of the indictment, and that the city, county or other jurisdiction named in the margin thereof should be the venue for all the facts stated in the body of the indictment. The Con. Stat. C. ch. 99, sec. 21, continued the provision in this respect of the 18 Vic. ch. 92.

Venue in ancient times had reference to the jurisdiction of the court, visne to the authority of jurors : at present venue seems to have reference to both.

Justices of the peace were appointed in the reign of Edward the First, and their appointments have been continued to the present time. When informations were laid before them, or oaths administered, by virtue of statutes authorizing them to do so, the venue was usually put in the margin, to indicate their jurisdiction therein. There have been in later times many statutes giving justices of the peace authority to administer oaths, without which they had no power by their commissions to administer. In practice, and by analogy to venue in legal proceedings, the margin of such oaths has very frequently the venue, as indicating the county or city wherein the justice has authority.

The second objection is, that there is no place stated in the jurat shewing where the affidavit was sworn ; but this is not necessary, for whether the jurat state where it was sworn or not, the perjury is committed when the defendant takes the oath, and the jurat so far as this is concerned is not material. The Courts have required for their satisfaction to have the place stated where the affidavit is sworn ; but perjury may be committed in an affidavit which the Courts would refuse to read. (See *Rex v. Hailey*, 1 C. & P. 258). The jurat is no part of the affidavit, per *Maule, J.*,

in *Hughes v. Brown* (6 M. & G. 752); and see *Grant v. Fry* (8 Dowl. 234); *The King v. Burn* (7 Ad. & El. 190).

Where an affidavit of debt contained no place in the jurat, but was sworn before the Chief Justice of Ireland, it was held a good foundation for holding to bail in debt: *French v. Bellew et al.* (1 M. & S. 302). (See *The King v. Justices of W. R. of Yorkshire*, 3 M. & S. 494). We think there is nothing in this objection.

The third objection is, "That the Crown was bound to shew the affidavit was sworn in the County of Grey, and there is no place stated where it was made, and the jurat does not shew where it was sworn." The latter part of the objection we have disposed of, and it is conceded the Crown was bound to shew what is here objected. The real question, therefore, in this case is, has the Crown given such evidence as warrants the jury in finding that this affidavit was sworn in the County of Grey?

If the jurat had stated the place, on the authority of the cases to which we refer, it would have been *prima facie* evidence of the administering the oath there: *Rex v. Morris* (2 Burr. 1189); *Rex v. Benson* (2 Camp. 508); *Rex v. Spencer* (1 R. & M. 97).

But as matter of fact, is there not evidence to warrant the jury in presuming that the affidavit was sworn in the County of Grey? The administering of the oath was a ministerial act. The oath was taken in a matter relating to Crown lands, in supposed compliance with the 28th sec. of the "Act respecting the sale and management of the public lands," 23 Vic. ch. 2.

The Crown directed our attention to the peculiar wording of the clause just mentioned, that all affidavits required under the act might be taken before certain persons therein mentioned, or "any justice of the peace;" and it was suggested that this gave authority for a justice of the peace to administer the oath anywhere in the Province. We think not; but that it only authorized any justice of the peace to administer the oath in the place in which he was a justice of the peace. The power is not conferred on the man person-

ally, but on him where he holds his office, and there only can he administer the oath. Power is also given by this act to any commissioner for taking affidavits in any of the Courts, but this must be where his authority as such commissioner exists, precisely as in the case of a justice of the peace.

For the Crown, it was contended that the maxim *omnia præsumuntur rite esse acta* applied here. It seems established that it does not apply to give jurisdiction to magistrates or other inferior tribunals: *Rex v. All Saints Southampton* (7 B. & C., 785); *Rex v. Hulcott* (6 T. R., 583). The first of these cases was an appeal against an order of two justices of the peace for the County of Hants, whereby Elizabeth Carden was removed from the parish of Romney extra in Hants to the parish of All Saints, in the Town and County of Southampton. The respondent parish offered in evidence and proved the following writing: "Town of Romney Infra, in the County of Southampton. The examination of Richard Roe Carden, &c.

"Sworn the day and year above mentioned before us."

The objection was, that it did not appear on the face of this paper that at the time of the examination of Edward Carden, the soldier, he was quartered in the town of Romney Infra, and therefore was not a due examination within the provisions and meaning of the Mutiny Act.

Bayley, J., held the examination ought not to be received, and *Holroyd, J.* said, "The rule that in inferior courts and proceedings by magistrates, the maxim *omnia præsumuntur rite esse acta* does not apply to give jurisdiction has never been questioned.

It is remarkable that the information in that case was open on the face of it to the same objection taken in the case now before us; for it is conceded that if the jurat of the affidavit, on which the perjury here was assigned, had contained the place where it purported to have been sworn, there would have been no objection. In the margin, at the commencement of the affidavit, it is here,

"Canada, County of Grey, to wit;"

And the jurat is

Sworn before me, at _____, this 18th day of February, 1865."

There it was,
"Town of Romney Infra, in the County of Southampton."

The jurat was,

"Sworn the day and year above mentioned, before us."

No objection was taken to it on this ground.

But, although a fact which would give authority to a justice of the peace, or inferior jurisdiction, is not to be presumed, that is not the case here, for the facts stated in this affidavit show that the justice of the peace had jurisdiction in Grey, if he exercised it there. Then, if we apply the maxim that the justice did act rightly, the conclusion is irresistible. To sustain the objection we must presume the justice of the peace administered the oath where he had no authority. He had jurisdiction in the County of Grey, but no where else. He administered the oath within that county, or out of it. No other supposition is possible. Now, to which of these do the circumstances point? In the case of the *Rex v. Burdett* (4 B. & Al. 95) this doctrine is laid down, that if circumstances are proved, which reasonably call for explanation on the defendant's part, which he can disprove, if the conclusion to which the circumstances proved by the Crown would lead, unless explained, then the conclusion becomes the stronger, because the plaintiff offers no explanation. On other principles announced in that case, we think, there is *prima facie* evidence, from which the jury might presume the affidavit was sworn in the County of Grey. At page 121, *Best, J.*, says: "It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to imagine guilt where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable; particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for

then we have something like an admission that the presumption is just.

It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. *Lord Mansfield*, in the *Douglas* case, gives the reason for this: 'As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other.'

In the highest crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavor to excite rebellion, you presume on an intent to kill the king. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts on cross-examination, or by direct testimony, to lower his offence to manslaughter, or justifiable homicide. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, if the libel is calculated to produce the effect charged, you presume the intent. It therefore appears to me quite absurd to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised, as to the *corpus delicti*, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me

in the most trifling cause that can be tried in Westminster Hall."

Abbott, C. J., says: "A presumption of any fact is, properly, an inferring of that fact from other facts that are known: it is an act of reasoning; and much of human knowledge in all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment.

In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the faculty that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but, in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected. And it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men conversant with the affairs and business of life, and who know that where reasonable doubt is entertained, it is their duty to acquit, and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtlety and refinement."

In the case before us, the fact to be presumed is that this affidavit was sworn in the County of Grey. The contents show that it related to lands in this county.

It was proved that the defendant subscribed the affidavit;

that John Walter, before whom it purports to have been sworn, is a justice of the peace for the County of Grey ; that he subscribed the jurat as a justice of the peace ; that he was not called as a witness, he being unable to attend the trial ; that he and the defendant reside in the County of Grey, and have resided there for some years ; that the affidavit was received through the Post Office by the agent for Crown lands in the County of Grey, but from whom it came was not shown, and by him it was sent to the Commissioner of Crown Lands ; and that subsequently a patent for the lot issued to John Cummington, on whose behalf it had been made.

From these circumstances, what is the reasonable inference ? Is it other than that it was sworn in the County of Grey ? To infer that it was not sworn there would be, first, to impute to the magistrate a dereliction of duty ; and, secondly, to impute to the defendant a design to defeat the object for which the affidavit was made. To all this the defendant offers no explanation.

We think, therefore, there was evidence from which it was to be inferred that the affidavit was sworn in the County of Grey, and that the jury properly inferred it so.

Nor is there anything in the fourth objection ; for if the affidavit was sworn in Grey, the proof of the swearing by the justice of the peace, and the taking of the oath by the defendant, were made out by proving their signatures to it : *Rex v. Morris*, (2 Burr., 1189.)

We think the conviction good. There will therefore be judgment for the Crown.

Judgment accordingly.

MYERS V. BROWN.

Sale of land for taxes—9 Geo. IV. ch. 3.

Held, following the current of decisions from *Doe d. Bell v. Reaumore et al*, 3 O. S. 243, that where taxes had been paid on lands to the Treasurer of the District where the lands lay, and a receipt obtained therefor, the subsequent sale of the lands by the Sheriff, as in arrear for taxes, in consequence of the Treasurer having omitted to credit the payment on the lot, was void, although the Treasurer had returned the lands as so in arrear.

Held, also, that such sale was equally void, where the taxes had, in accordance with 9 Geo. IV. ch. 3, been paid to the Treasurer of the District in which the owner resided.

This was a special case stated for the opinion of the court.

The action was ejectment for lot number 22, in the 7th concession of Belmont, in the County of Peterborough, formerly part of the Newcastle District.

The defendant defended for the south half of the lot.

It was admitted that the plaintiff had title by conveyance from the patentee, and was entitled to recover, unless the sale for taxes hereinafter mentioned should be held to be valid.

*The defendant claimed under the purchaser at the tax sale.

The lot was patented on 20th of January, 1836, to the Hon. Alexander McDonell, who then and during all the years hereinafter mentioned resided at Toronto, then in the Home District, and who continued to own the land until 1843, when he conveyed to the plaintiff.

The land was wild land, and was not returned on the assessment roll of any township or place in the Newcastle District, but was duly charged with the taxes by the Treasurer of that district under 59 Geo. III., cap. 7, sec. 14, for the years 1836 to 1841, both inclusive.

The Hon. Alexander McDonell paid the taxes for the said six years to F. T. Billings, the then Treasurer of the Home District, with the per centage which the said Treasurer was entitled to claim, and received from him receipts therefor.

The said Billings remitted the amounts so received by him to the then Treasurer of the Newcastle District, but

directed them to be applied on a lot of a similar number in another concession, and the amounts were so applied by the Treasurer of the Newcastle District, and were not applied by him on the lot in question, in consequence whereof the lot was returned as in arrear for taxes, and was sold in 1844 for the taxes aforesaid.

It was admitted that unless the said payment was good and sufficient, the sale for taxes was in other respects regular and valid.

The question for the Court was whether the said payment was good and sufficient, so as to render the sale invalid.

If the Court should decide in the affirmative judgment was to be entered for the plaintiff, with costs of suit: if in the negative, the defendant was to have judgment with costs of defence.

J. A. Boyd, for the plaintiff:—

The Court will look to see if there has been an actual *bonâ fide* payment of the taxes, and will not give effect to a sale of the lands which has been made in consequence of an *omission* (accidental or wilful) of this officer to make such returns and entries as will shew the payment on the proper rolls and books: *Harbourne v. Boushey*, 7 C. P. at p. 467.

The same in principle is laid down in *Allan v. Hamilton*, 23 U. C. R. 109.

If plaintiff *tenders* redemption money to the Treasurer, and he refuse to receive, such tender and refusal are equivalent to payment, and the Sheriff's deed will be inefficacious: *Cunningham v. Markland*, 5 O. S. 645.

He referred, also, to *Baldwin v. Johnson*, 2 U. C. R. 475.

C. S. *Patterson*, contra, cited *Doe Upper v. Edwards*, 5 U. C. 596; *Doe Sherwood v. Matheson*, 9 U. C. 321; 59 Geo. 3 ch. 7, secs. 12, 14; 6 Geo. 4, ch. 7, secs. 6, 7, 9 10, 11, 12, 22; 9 Geo. 4, ch. 3; *McDonald v. Roe*, 9 C. P. 76.

RICHARDS, C. J., delivered the judgment of the court.

It will only be necessary to consider two points in disposing of this case:—1. Supposing the amount due for taxes on a lot of land had been paid to the Treasurer of the dis-

trict, in which the lands lay, and a receipt obtained therefor, could such lands afterwards be sold for taxes, being entered by the Treasurer as in arrear, and the statute in other respects complied with so as to make the sale regular? Would such sale deprive the owner of his land when no taxes were in fact due on it at the time of the sale?

2. If the sale would not be good when made after the payment of the taxes in arrear to the Treasurer of the district where the lands were situate, would it be good when such taxes had been paid to the Treasurer of another district, under the provisions of statute, 9 Geo. IV., cap. 3?

As to the first question to be considered, I assume that it has in effect been decided in several cases before our own courts.

In *How et ux v. Thompson*, referred to in *Robinson & Harrison's Digest* as of Michaelmas Term, 6 Vic., where I have seen reference to the case, which I believe is not reported, the question, I apprehend, was considered. The note there given of the case is as follows:

"If a writ has been issued for the sale of land for taxes, but before sale under it the taxes are paid, the sale is illegal and void."

In *Doe Upper v. Edwards* (5 U. C. Q. B., 596) *Sir J. B. Robinson*, in giving the judgment of the Court, referring to *Doe Dem. Bell v. Reaumore* (3 O. S. 243), decided in that Court, says: "The Court determined in that case expressly that the title under the Sheriff's sale for taxes could not be upheld, if it were made to appear that there was in fact no arrear of taxes subjecting the land to sale, notwithstanding the return made by the Treasurer, or that there was at the time of the sale sufficient distress on the premises." He refers to *Doe d. Bell v. Orr*; *Doe d. Powell v. Rorison*; *Doe Powell v. Craig*, in which the Court had considered the provisions and effect of the Statute directing the sale of land for taxes; and he thought, too, in a case (*Doe d. Cunningham*), of which he had no note, and then says: "In accordance with what has already been decided in these cases, we must hold that if on either of these grounds the sale was made

contrary to the provisions of the Statute, the purchaser's title will be defeated. The clearer ground of the two seems to me to be that which relates to there being distress on the premises, and it is on that ground on which we have most frequently had occasion to decide." He then discusses the case on the question of there being distress on the premises, and pronounces the judgment of the court in favour of the defendant and against the purchaser under the sale for taxes. The head note of the case after referring to the facts, concludes: "*Held per curiam*, the sale void on two grounds; first, because it appeared that, notwithstanding the return made by the Treasurer, there was no arrear in fact of taxes subjecting the land to sale; and secondly, because at the time of sale, there was a sufficient distress on the premises."

In *Doe Dem. Sherwood v. Matthewson* (9 U.C. Q.B., 321) *Sir J. B. Robinson*, said: "There is no mistake on the part of the Treasurer in returning the land as being liable to sale, when in fact it was not, on which ground the validity of the sale made in consequence has been in other cases questioned in this Court." I merely quote this to shew that the learned Chief Justice must have had that point clearly in his mind, when referring to it in his former judgment above referred to.

In *Harbourn v. Boushey* (7 U. C. C. P. 464) it was held that the vendee of the Sheriff on a sale for arrear of taxes which did not appear to be clearly due, was not entitled to recover, and the present Chief Justice of Upper Canada, in giving judgment in that case in this Court, said, referring to the wording of the 65th sec. of 16 Vic. ch. 182, and comparing it with 18th sec. of 6 Geo. IV. ch. 7: "At all events I am not prepared to decide that the expression used in the enactment (65 sec. 16 Vic. ch. 18), with respect to the effect and operation of the Sheriff's deed, are to make it valid and binding, notwithstanding it should clearly appear that the owner had regularly paid the taxes every year as they accrued, and that the sale arose from an omission (accidental or wilful) to make such returns and entries as would shew the payments in the proper rolls and books. I think,

notwithstanding the execution of the Sheriff's deed, the owner must be heard to prove that there was nothing in arrear for which the lands could be sold." This language seems to imply that under the Statute of 6 Geo. 4 the sale, where it was not shewn that taxes were in arrear, would be void.

The case of *Baldwin v. Johnson* (in 2 U. C. Q. B. 475) is similar in this respect, that the taxes were first paid to the Treasurer of the Home District to be transmitted to the Treasurer of the Ottawa, and the amount never seemed to have been sent forward there. The lands having been advertised for sale for arrears of taxes, the plaintiff, to prevent their being sold, paid the arrears a second time to the defendant, who was Treasurer of the Ottawa District, under protest, and then sued him to recover back the money. The Court held, as the plaintiff had paid the money in full knowledge of all the facts, he could not recover it back again in that action. The Court carefully avoided giving an opinion whether the payment to the Treasurer of the Home District would have been such a payment of the taxes as would have made a subsequent sale by the Sheriff of the Ottawa District of these lands, as in arrear for taxes, void.

From the current of decisions on the first point, though if it were a new one it would be open to much discussion, I think, we must hold, if the payment had been made to the Treasurer of the Newcastle District, and he had by mistake omitted to credit the payment to the lot, the subsequent sale for taxes would have been void, though returned by the Treasurer as in arrear for taxes, there being, in fact, no taxes due on the lands at the time of the sale to warrant such sale.

Then as to the second point: Was payment of the taxes by the owner of the land (a resident of the Home District at the time) to the Treasurer of the Home District, *a payment of the taxes* so as to discharge the land from them?

The preamble of the act recites the expediency of enabling persons holding lands in the several districts in the province

to pay the taxes to the Treasurer of the district in which they may reside.

The first clause enacts that it shall be lawful for any person, holding or owning lands in any District of this Province, which are not returned on the Assessment Roll of any Township, *to pay* the rates on such lands to the Treasurer of the District in which he may reside. The Treasurer is required, on being requested so to do, to give a receipt for the same, specifying the amount paid, the period for which it is paid, the lot or parcel of land on which it is paid, the concession and township in which it is situated, and also the time or date of payment.

By section 2 it was made the duty of the Treasurer receiving such rates under that act to keep an exact and accurate account of the moneys which he shall receive for each district separately, stating the lots, parcels, or tracts of land on which the same may be paid, and the concessions and townships in which they may be situated, and the period for which such rates are paid, and also the time and date of such payments; a copy of which account, verified upon oath, he shall transmit annually on the first day of July, to the Treasurer of the district in which the lands may be situated; and he shall at the same time transmit the amount of taxes which he may have received under the provisions of the act.

Section 3 directs the Treasurer of the district receiving the money forthwith to credit the several lots specified in the schedule accompanying the money, with the amount mentioned in the schedule to be paid thereon, and that he shall, within ten days after the same shall have been received, transmit to the Treasurer sending the same a receipt for the amount, specifying the lots, parcels or tracts of land on which such rates or taxes are paid, the amount on each particular lot or parcel of land, the periods for which the same are paid, and the concessions, townships and districts, in which the lands are situated, *and the time or date of the several payments*, which receipt the Treasurer who may have

received the taxes in the first instance, shall shew to any person interested therein, on being requested so to do.

Section 8.—If any Treasurer neglects or refuses to perform the duties imposed upon him by the act, he is liable to forfeit £50, to be recovered before the Court of General Quarter Sessions, one half to be paid to the informer, and the other into the public funds of the district. The section further provides that it shall be the duty of the magistrates in General Quarter Sessions next after 1st July in each year, to examine the accounts required to be kept under that act, and to ascertain whether the same had been transmitted, together with moneys, to the Treasurers of the several districts *interested therein*.

Section 4 refers to the difficulty of transmitting moneys, whereby many of the inhabitants had not been able to pay the taxes on land owned by them in distant districts, and states it is expedient to extend the period for the payment thereof. If the proceeds of certain taxes are paid before the 1st of January, 1829, they shall not be liable to a greater increase than 30 per cent.

Section 6 forbids Treasurers receiving any taxes on lands not in their own district, when the rates are in arrear for the space of six years, knowing that to be so; but in such case the tax shall be transmitted by the party desirous of paying the same to the Treasurer of the district where the land is situate.

As already stated the preamble recites the expediency of enabling persons owning lands in several districts *to pay the rates and taxes* on the same to the Treasurer of the district in which they reside. The first enacting clause declares it shall be lawful for such persons "*to pay the rates on such lands*" to the Treasurer of the district in which he resides: then, that Treasurer is bound, if requested so to do, to give a receipt for the same. This language surely implies something more than the merely depositing the money with the Treasurer, to be transmitted for the party paying to the Treasurer of the district where the land lay. In addition to giving the receipt he was to

keep an account of the moneys he received for each district separately, which he was to transmit annually on the 1st of July in each year to the Treasurer of each of the districts for which the account was kept. This was evidently for the purpose of enabling these Treasurers to make up their accounts to the 1st of July in each year, and probably to prevent the addition of the per centage that might follow if the taxes had not been paid before the first of July. The receipt to be sent back to the Treasurer remitting the money was not a receipt to each owner of a lot shewing the taxes on his particular lot to have been paid, but one in which was stated all the lots for the payment of the taxes on which the money remitted had been applied, and that receipt was also to name the time or date of the several payments. This surely must mean the date at which the taxes were paid to the Treasurer remitting them to him, not the time of the payment to himself, for that was made on all the lots at the same time, and, as already observed, the time would become important, as shewing the payment of the taxes, to prevent the percentage being added when there was a delay of payment beyond the fiscal year.

The prohibiting by section six of the receipt of any taxes for lands in arrear for six years (if the Treasurer knew it) would, also, seem to be a judicious provision to prevent embarrassment on the part of the Treasurer of the district where the lands were situate, if taxes had been received after the lands were eight years in arrear and had been advertised for taxes. Limiting the receipt of the money, when the lands had not been six years in arrear, would rarely create any difficulty as to the sale or advertising, and when longer in arrear than six years a direct reference by the owner to the Treasurer of the district where the lands were situate would be more convenient, and likely to create less embarrassment.

The 8th section speaks of the Magistrates in Quarter Sessions, after 1st of July in any year, examining the accounts to ascertain whether the same had been transmitted

with the moneys to the Treasurer of the several districts *interested* therein.

If the non-payment of the money by the Treasurer, who received the same, would leave the lands still liable to be sold for taxes, the districts, in which they were situated, would have no *interest*, in a legal sense, in the money the Treasurer ought to have remitted to them. But if, by the payment to such Treasurer, the lands were discharged from taxes, they of course had a *paramount interest in the money*.

It is true the 3rd section of the Act requires the Treasurer, to whom the taxes were paid in the first instance, to shew the receipt sent him by the Treasurer, to whom he has remitted the taxes, to any person interested therein; yet I cannot say it follows from that that those taxes were not paid the moment they were handed to the Treasurer. The person paying the taxes might well be interested in seeing if the taxes were handed over as they ought to be. *Baldwin* and *Johnson* shews that, for want of such payment, parties may have been, and doubtless were often, put to much inconvenience, if not actual loss, by the moneys not being paid over as they ought to have been, and this interest would of course make it wise to require the Treasurer to show such receipt. It might, also, be a question if the Magistrates of the County, who in Quarter Sessions at that time represented the authorities of the then district, would not be *interested* in the receipt, as shewing so much money paid to their Treasurer, for which he may have omitted to account, and which they would also wish to see for the purpose of having the proper credit given to each of the lots named therein.

The receipt for the taxes is given to each individual, who pays them, by the Treasurer who receives the money: that is his voucher that the money is paid. The receipt sent by the Treasurer receiving the money shews the application of all the moneys he has received: that is not given to the several persons, who have paid the money: they could only

see it in the hands of the Treasurer. But, suppose the Treasurer of the district, within which the land was situate, misapplied the money, and did not credit the different lots with it in his books, though he had sent the proper receipt that he had done so; are the taxes then paid? If so, from what time?

We have assumed that it is established that, if the taxes were paid to the Treasurer of the district in which the lands were situate, they could not be sold for such taxes, as being in arrear. I am not aware of language used in the former Acts authorizing the Treasurer of the district, in which the lands were situate, to receive arrears of non-resident land tax, that is any stronger than that which authorises the Treasurer of the other district to receive it and transmit it.

The strongest language on that subject, I think, is contained in sec. 4 of 59 Geo. III., cap. 8. It states, "The Treasurer of each and every district in this Province is hereby authorized and empowered to receive from any person or persons paying the same the rates or taxes by this Act imposed in respect of all lands not returned on the assessment roll."

The words of the statute, (9 Geo. IV., cap. 3) already quoted, are, "That it shall be lawful for the person owning lands, &c., to *pay the rates* on such lands to the Treasurer of the district in which he resides, and the Treasurer, who may receive such rates, shall, on being required, give a receipt for the same;" and the 8th section makes the same Treasurer liable to a penalty of £50, if he neglects or refuses to perform the duties imposed on him by the Act.

Is it not one of those duties to receive the taxes which by the statute the owner is authorized to pay him? In this view this Treasurer was not only authorized to receive the rates on the land, but was bound to do so under a penalty; and by the Act the owner of the land was authorised to pay them to him. It seems to me that this view must close the argument, and as clearly establishes the right to pay the

taxes to the Treasurer of the district in which the owner resided, as it would to pay those rates to the Treasurer of the district in which the lands were situate.

We think the judgment of the Court must be for the plaintiff.

Judgment for plaintiff.

WRIGHT V. SKINNER.

Breach of promise of marriage—Deceit—Presumption of innocence—Nonsuit—Scintilla of evidence.

The declaration contained four counts; the first, for breach of promise of marriage, alleging that defendant was an unmarried man, and that the promise was to marry the plaintiff within a reasonable time.

The second count was for deceit, alleging that defendant was an unmarried man, and that he falsely, &c., pretended to plaintiff that he was desirous of marrying her, and thereby persuaded her to go with him to T., for the purpose of having a legal marriage celebrated between them; and falsely, &c., persuaded her to enter into a pretended marriage; and falsely, &c., pretended to plaintiff that the said marriage was a lawful marriage, and thereby persuaded plaintiff to cohabit with him as his wife.

Third count, that defendant falsely, &c., pretended to plaintiff that he was an unmarrind man; and falsely, &c., pretended that he was desirous of marrying her, and by false pretences caused plaintiff to submit to a pretended marriage with him; and falsely, &c., persuaded her that the pretended marriage was a lawful marriage, and thereby induced her to cohabit with him.

The fourth count was for an assault.

At the trial, evidence was given of attentions to plaintiff on the part of defendant, and of letters written to her by him; but it appeared that at the time defendant was a married man, and that plaintiff was aware of the fact. It was, also, proved that defendant had said he would persuade plaintiff that he was divorced, and take her away, to spite her children; and that plaintiff had said she would have nothing to do with him till he was free. Defendant was never divorced, and his wife was still living at the time of the trial. Defendant and plaintiff subsequently went to a hotel in W., calling themselves man and wife, and afterwards took a house there, still passing as man and wife, and resided there for a short time. There was no positive evidence of any marriage ceremony:

Held, on motion to enter a nonsuit, pursuant to leave reserved, (*dissentiente* Adam Wilson, J.) that there was no evidence to go to the jury on any of the counts.

2nd. That the presumption of innocence, that the defendant had not been guilty of a conspiracy, was an answer to any presumption of a marriage ceremony to be drawn from the cohabitation proved.

3rd. That on a motion to enter a nonsuit, pursuant to leave reserved at the trial, the court will not consider whether there is a *scintilla* of evidence, but will make the rule absolute, where they would have set the verdict aside, if the motion had been to set it aside as against evidence.

The defendant was arrested under a writ sued out on 28th July, 1866.

The first count of the declaration stated that prior to 1st January, 1865, and from that time, the plaintiff was and continued to be an unmarried woman, and defendant during all the period aforesaid was and continued to be an unmarried man, and on 1st July, 1865, and at divers times between that day and the 15th April, 1866, the defendant, in consideration that plaintiff being unmarried, at the request of the defendant, had then promised the defendant to marry him within a reasonable time after a request, then promised her to marry her within a reasonable time after he should be thereunto requested: *avermant*, that, confiding in the said promise, she had always hitherto remained unmarried, and was, during all that time, ready and willing to marry defendant, whereof he always had notice; and although plaintiff, after making the promise, to wit, on 2nd April, 1866, requested defendant to marry her, and a reasonable time from making the request so to do having elapsed before the commencement of this suit, yet defendant, disregarding his said promise, had deceived the plaintiff in this, that he did not, nor would, within a reasonable time as aforesaid, nor at any other time, marry her, but had wholly neglected or refused so to do.

The second count alleged that defendant, prior to and on 1st January, was and continued to be an unmarried man, and the plaintiff then was and continued to be an unmarried woman, and before the committing of the grievances by the defendant, as thereafter mentioned, the plaintiff was a person of good name, credit, and reputation; yet defendant, continuing and maliciously intending to injure and wholly ruin plaintiff, and to induce her to live and cohabit with him, on 1st July, 1865, and on divers other days between that day and the 10th of April, 1866, falsely, maliciously and deceitfully pretended and represented and promised, and by certain false, malicious practices and representations, and indirect means, caused the plaintiff to believe that defendant would marry her within a reasonable time, and plaintiff, confiding and believing in the false, malicious and deceitful representations and promises of defendant, and by means

thereof, deceived the plaintiff, and caused and procured the plaintiff to separate herself from her family, and to go to the city of Toronto, for the pretended purpose of having the ceremony of marriage duly solemnized between the plaintiff and defendant, according to the laws of Upper Canada, by some person duly authorized to solemnize matrimony, and the defendant, by means of such false and deceitful practices and representations and indirect means, procured and induced the plaintiff to go before some person unknown to the plaintiff, to the city of Toronto, and to enter into a pretended marriage with the defendant, and which pretended marriage was solemnized ; and thereupon the defendant, further contriving and intending as aforesaid, falsely, maliciously and deceitfully pretended and represented to the plaintiff that the said pretended marriage was lawful, and by the means aforesaid the defendant procured and induced the plaintiff to cohabit and live with him as his lawful wife, and to go with him from the city of Toronto aforesaid to the town of Woodstock, and live, remain and cohabit with him, and take charge of his household, to wit, for the space of three months ; whereas in truth and in fact, the defendant, during all the time aforesaid, did not intend to marry the plaintiff, and did not marry the plaintiff, but by the means aforesaid fraudulently and deceitfully procured for his own benefit the labour, services or attendance of the plaintiff in and about managing his household affairs for three months, whereby the plaintiff was greatly injured in her good name, fame, credit and reputation, and lost the esteem and respect of her friends and neighbors, and the comfortable society of her family, and lost certain gains and profits, which she could and would otherwise have made in and about her usual occupation and business.

The third count alleged that plaintiff was a person of good fame, &c., and enjoyed the esteem, &c., of divers persons, yet defendant well knowing the premises, and contriving, &c., to injure and defraud the plaintiff, and to bring her into scandal and disgrace, heretofore, to wit, on 1st January, 1866, and on divers other days, and divers other days be-

tween that day and 10th April, 1866, by fraudulently, falsely, maliciously and deceitfully pretending and representing to plaintiff (who was, and during the time aforesaid remained, sole and unmarried) that he was sole and unmarried, and that he was desirous of marrying her, and by means of divers other false, deceitful and indirect means and pretences, the defendant caused the plaintiff to consent with him to marry him, and defendant, in further pursuance of his said intent, fraudulently, maliciously and deceitfully induced, caused and procured the plaintiff to submit to a false and pretended form of marriage with him, and by falsely and deceitfully pretending and representing to the plaintiff, and she believing and being induced by the pretence to believe, that the pretended marriage was a lawful marriage, and that by the pretended marriage they were lawfully married, fraudulently and deceitfully induced and caused plaintiff to live and cohabit with defendant, as his wife, for the space of three months, and to do and perform work, labour and service for him in and about the management of his house and domestic affairs; whereas in truth and in fact the defendant did not desire to marry the plaintiff, nor was he sole and unmarried, nor was the said pretended marriage duly or legally solemnized, or a lawful marriage in Upper Canada, nor was the defendant lawfully married to the plaintiff,—all which the defendant well knew, but contriving, &c., he falsely, maliciously and deceitfully concealed from the plaintiff, and by means of the premises the plaintiff was put to great trouble and expense in and about procuring divers articles of dress and wearing apparel, to the value of ten pounds, to be used and worn by the plaintiff on the occasion of the intended marriage, and lost the value of her time for three months, which time she could otherwise have profitably employed about her own business and affairs, and thereby plaintiff was injured in her good name, credit and reputation, and brought into public scandal and disgrace, and had been and was shunned by divers persons, and otherwise injured.

The fourth count was, that defendant, on divers days and

times between the 10th of April and 10th July, 1866, with force and arms assaulted the plaintiff, &c.

Defendant pleaded,

1. To first count, *non assumpsit*.

2. To first count, that before and at the time of the said alleged promise, defendant was and continued lawfully married to one Eliza Skinner, who was still living, and who, during all the time aforesaid, was and continued to be the lawful wife of defendant, of all which plaintiff had notice and knowledge, and so a reasonable time for performing his said promise had not elapsed before the commencement of this suit.

3. To the second count, Not guilty.

4. To second count, that before and at the several times in said count mentioned, defendant was and had been, and continued to be lawfully married to Eliza Skinner, who was still living, and was defendant's lawful wife, of all which the plaintiff before and at the several times in the second count mentioned, had notice and knowledge.

5. To third count, Not guilty.

6. To third count, same as fourth plea to second count.

7. To fourth count, Not guilty.

The plaintiff joined issue on these pleas.

The cause was tried before *Adam Wilson, J.*, at the last Fall assizes held for the County of Oxford, when a verdict was rendered for the plaintiff for two thousand dollars damages.

The facts established by the evidence at the trial seemed to be as follow :

Plaintiff and defendant were both over fifty years of age at the time the occurrences referred to took place. When young they had been engaged to be married, but the match for some cause or other had been broken off. Both had afterwards married and had grown up families. Defendant's wife then and still lived near Oshawa. They had parted, and it had cost him, as he said, some six or seven thousand dollars to bring about the separation. She

resided about a mile and a half from one Terry's, where defendant resided in March, 1865, Terry's wife being his niece. Plaintiff prior to this time lived with her son in Uxbridge. Two of her daughters were milliners, residing at Cannington, in the township of Brock. Previous to March, 1865, the parties had met and were together at Oshawa, where they had their photographic likenesses taken together in the same picture, with their hands clasped. She at first objected to have their likenesses taken together, saying that people would talk about it; but he finally persuaded her, and she consented.

In February of that year (1865) he drove plaintiff in his own conveyance to her daughter's, in Cannington, and then next day to her son's, in Uxbridge, she remaining at the son's house and he at the hotel. In two or three weeks after he returned and stayed at the son's place all night, taking tea there. Plaintiff sat alone with him in the sitting room until about 9 o'clock, when he retired to bed, sleeping at the son's house. The son's wife thought he came as a suitor. In March, 1865, whilst defendant was stopping at Terry's, he was taken ill. One of plaintiff's daughters was at Terry's at that time. He dictated the following letter, which Mrs. Terry wrote for him, to the plaintiff:

"EAST WHITBY, March 27, 1865.

"MIRANDA,

"I am sick. I am at John Terry's. I don't expect to live long. I want you to come down right off. I would like to see you before I die.

"Yours truly,

"ABIRAM SKINNER."

On receipt of this letter plaintiff visited defendant at Terry's house and remained a day. She then knew defendant had a wife living at Oshawa. Her daughter advised her not to have anything to do with defendant as he was a married man, and defendant heard her tell her mother this. He told the plaintiff to keep quiet from her daughter and he would go to the States and get a divorce, and they would

get married unknown to the daughter. There was not then any arrangement to get married.

On the 11th April, 1865, defendant wrote from East Whitby to plaintiff as follows :

“ TO MISS MIRANDA WRIGHT—

“ I am a little better. It will be a long time before I get well. I can't sit up only a little while at a time. Lib has been up to Pickering 5 days. She went on Sunday out to Enniskillen. I don't know when I can come up to see you. Come down if you think best.

‘ Remember well and bear in mind,
A trusty friend is hard to find ;
But when you find one just and true,
Never change him for a new.’

“ No more at present.

“ ABIRAM SKINNER.”

Defendant appeared to have had frequent conversations with his niece, Mrs. Terry, on the subject, and plaintiff also had some conversation with her. Defendant told her if he could not get plaintiff off, he would persuade her off to spite her children. Plaintiff said she would not have defendant so long as he was bound to another woman. Defendant said he would get a divorce if it cost him a \$1000. Plaintiff was absent in the States after that conversation. Mrs. Terry told plaintiff, about the time the photographs were taken, as the evidence may be understood, not to go away with defendant ; but she added, however, in giving her evidence, “ for all that he deceived her that he was clear of his wife.” Mrs. Terry also added, defendant said he would make plaintiff believe he was clear of his wife, and get her away. There had been something said of a divorce all the while. Mrs. Terry had no idea they were going away to be married, as defendant was a married man, and plaintiff knew he had a wife.

In October, 1865, defendant visited plaintiff at her daughter's, in Uxbridge. Nothing more was shewn of the particulars of any intimacy between the parties until 31st March

1866, when defendant went to the house of her daughter, in Uxbridge, and took plaintiff to her son's house, where they remained all night. The very next morning they left her son's house together, 1st April, 1866. He then said he had been to the States in March before.

The plaintiff was proven to have been at a public house in Toronto, in April. She came on the 2nd of April, and on the 5th she left with a man, who called himself Skinner, and who paid her bill. On the 11th of April, 1866, they went to the hotel in Woodstock, kept by one Woods. They lived there as man and wife at the hotel until he bought a house about two or three weeks after. They then removed into the house, and lived together there as man and wife. During the summer they both left Woodstock, and the house was locked up. She returned about the 16th June, and on going to the house found it locked. She then went again to Wood's hotel. When defendant returned to Woodstock he reported that his wife, meaning plaintiff, was dead, and that he had been at her funeral. She was at that time at Wood's hotel, which he did not know. After that, and after the action was commenced, he said she was not his wife; that his first wife was living; that he had never been married to plaintiff, and he had hired her to keep house for him by the week. To another witness he said he was not married to plaintiff, and she could not prove he was.

The learned Judge told the jury that defendant's saying he had married plaintiff, and his co-habiting with her, as his wife, were some evidence that a marriage ceremony, or pretended marriage ceremony, had been performed, and it might be presumed it was not such as would have made it a lawful marriage, if defendant had not then been a married man; for such a *pretended* marriage as that would not make the offence of bigamy, and it would not be presumed that bigamy had been committed; that it might be presumed that no real marriage had in fact taken place, from the declaration of the defendant that plaintiff was not his wife, and that he had never married her; that there was evidence that defendant had represented to plaintiff he had got a divorce from his former wife,

when in fact no such divorce had been granted; that it does not appear when the first marriage took place, and therefore a divorce in the United States, if it had been granted, might have been a valid and legal proceeding; that if the plaintiff married, or submitted to a pretended ceremony of marriage, with defendant, knowing that his former wife, who was still living, had not been divorced, she was not entitled to recover.

The counsel for the defendant objected to the charge, substantially on the grounds stated in the rule *nisi* set out below.

J. Anderson, on behalf of the executors of the defendant, who had died since the rendering of the verdict obtained a rule *nisi* to set aside the verdict and enter a nonsuit, pursuant to leave reserved at the trial, on the grounds:

1. As to the first count, that there was no evidence of a promise to marry; that, at the furthest, there was only a promise to marry when the defendant should get a divorce from his then wife, and such promise varied from that alleged; that such promise was illegal and contrary to public policy; that there was no evidence defendant had obtained such divorce, and plaintiff was aware defendant was a married man.

2. As to the second and other counts, that there was no evidence of the various fraudulent representations or illegal acts of the defendant, as alleged; that it appeared that the defendant was a married man, and plaintiff was aware of the fact; and that there was no evidence of such sham or pretended marriage, as alleged.

3. As to the fourth count, that there was no evidence of the alleged assault—

Or, why the verdict should not be set aside and a new trial had, on these grounds:

1. That the verdict was contrary to law and evidence, on each of the above grounds.

2. On the ground of misdirection, in this, that the learned Judge, who heard the cause, ruled that there was evidence to go to the jury on the first, second and third counts; also, in ruling that it might be inferred from this statement of the

defendant, that he would cause the plaintiff to believe that he had got a divorce,—that he had in fact caused her to believe he had got a divorce ; and also in ruling that, from the fact of the parties having agreed to marry, and of their cohabiting as man and wife, and defendant saying that they were married, the jury might infer an actual marriage ceremony of some kind : also, in ruling that there was some evidence of some kind of marriage ceremony ; also, for non-direction, in not telling the jury that there was no evidence of a divorce, and in not telling the jury that the plaintiff must be taken to know, as a matter of law, that a divorce in the United States would not be sufficient.

And, also, on the ground that the verdict on the fourth count was perverse, as the learned Judge directed the jury to find for the defendant on that count. Also, on the ground of excessive damages. Or, why judgment should not be arrested, on the ground that the second and third counts were bad in substance, in this, that the marriage in these counts referred to was a false and fraudulent form of marriage, and it must be assumed that it was false and fraudulent to the knowledge of the plaintiff, and the allegation, that the defendant subsequently caused her to believe that the marriage was valid, was not sufficient.

D. G. Miller shewed cause :—

The attentions bestowed by defendant on plaintiff,—visiting her family with her ; the terms on which he was received by her ; these, with the letters put in, and the other circumstances of the case, were sufficient to go to the jury as evidence of a promise of marriage by defendant to plaintiff. A promise of the kind may be inferred from the conduct of the parties : *Frank v. Carson*, 15 U. C. C. P. 135. There was no evidence that plaintiff was a married man. If the record is defective in any way, application is now made to amend, that the verdict may be held. He cited *George v. Thomas*, 10 U. C. Q. B. 604 ; *Goodeve's Law of Evidence*, 601.

He filed affidavits to shew that defendant had died since the trial and before the term, and contended a new trial could not be granted, and that the rule was irregular.

S. Richards, Q. C., contra:—

The fact that plaintiff well knew defendant to be a married man is established beyond all doubt, and none of the facts, keeping this in view, will warrant a presumption that defendant ever contemplated a matrimonial alliance with her, or that she could have supposed such was intended. If there was any agreement between them, it was to marry her after the death of his wife, or after he obtained a divorce from her, and in either case that is not a contract to marry within a reasonable time, nor is it a valid contract at all: *The Liverpool Adelphi Loan Association v. Fairhurst*, 18 Jur., 11; *Wild v. Harris*, 7 C. B., 999; *Millward v. Littlewood*, 5 Ex. 775.

There was no valid agreement to marry up to March or April, 1866—nothing to shew at that time he had obtained a divorce, but that he intended to do so. The reasonable view to take of the evidence is, that she knew she was living in adultery with defendant. If she really believed he could legally marry her, why did not the ceremony take place in the presence of some of her friends? and why did they not reside or live, or even appear together in presence of their friends and relations, as man and wife? It is more unreasonable to suppose that a woman of her age and experience, having a family of children grown up, could be persuaded by the defendant to engage in a marriage with him under the circumstances, as is contended for by the plaintiff, than to come to the conclusion she was just as willing to live with him without any lawful marriage at all. Her evident inclination from the first was to go with him, notwithstanding the remonstrances of her daughters and others.

Under any view of the case the damages are extravagant and absurd, and, if allowed to stand, would rather encourage the very questionable course pursued by the plaintiff, taking the view most favourable for her.

Anderson on the same side:—There is a fatal variance as to the first count; for if any promise of the kind there referred to was made, it was a promise to marry, not with-

in a reasonable time, but after defendant should obtain a divorce. The verdict should be for defendant on the variance, for the count, if amended, would shew an illegal contract.

As to the second count—If it is to be presumed that an insufficient ceremony was performed, that would be to presume, at least, a conspiracy on the part of those engaged in it; and an offence against the law of that kind will not be presumed: *Best* on Evidence, sec. 334; *Rex. v. Twynning*, 2 B. & Ald. 386; *Rex. v. Harborne*, 2 E. & E. 540; *Lopsley v. Greerson*, 1 H. of L. 498.

As to the presumptions in favour of marriage, see *Best* sec. 339. The evidence of defendant having been made before is overwhelming.

As to the second and third counts, the allegations of a pretended marriage must be taken most strongly against the pleader, and in that view she knew it was only a pretence, and therefore as to her there was no fraud.

There was no evidence whatever to sustain the last count.

The damages having been assessed on the whole declaration, if not warranted by the evidence as to all, or if any one of them be bad, the verdict must be set aside; for it is impossible to say what portion of the damages was assessed on one count, and what on the other.

As to the form of the rule, the case of *Freeman v. Rosher*, 13 Q. B. 780, shews it was properly moved on behalf of the executors of the deceased defendant; and *Griffith v. Williams*, 1 Cr. & J. 47 shews that a new trial may be granted without inconvenience, notwithstanding the death of defendant.

RICHARDS, C. J.—As to the first count, the evidence does not sustain it, for it assumes that both plaintiff and defendant were unmarried, when the promise to marry, if any, was made. The evidence shews that plaintiff was married, and so continued up to the bringing of the action and since. When I say evidence, I mean the evidence necessary to shew a marriage repute; co-habitation, and nothing to repel

that presumption. If it had been shewn by clear and satisfactory evidence that a marriage in fact had been celebrated between defendant and some other person by an individual duly authorized to perform the marriage ceremony, and such marriage had taken place after defendant's separation from his wife, some of the cases shew that a presumption would arise that defendant would not commit a crime, and that that presumption might neutralize the other presumption of a prior marriage from co-habitation. Here, however, there is failure of a proof of an actual second marriage, and there is no reasonable presumption against the former one.

The second count, also, fails, as it is based on the assumption that defendant was an unmarried man at the time the alleged injury took place, and that plaintiff believed him to be such unmarried man; whereas the evidence shewed that defendant was then married and she knew it. I think the evidence fails to establish this count.

The fourth count (for assault and battery) does not seem sustained by the evidence. There is no analogy in this case to that of a medical man having improper connection with his patient under pretence of treating her professionally. In such a case, as the learned Judge observed on the trial of this cause, it is a submitting to the act complained of, arising out of the fraud, but there is no consent. So, when a man has connection with a woman, personating her husband, she believing him to be the man who is her husband, then there is no consent to the party committing the fraud to have connection with her, but rather the person he represents. But here there is no doubt any connection defendant had with plaintiff was with her consent: the fraud, if any of which he was guilty, was in inducing her to believe she was his wife.

The only count on which there is any possibility of sustaining the verdict is the third, and the effect of that count is that defendant represented himself as an unmarried man, proposed to plaintiff to marry her, and a pretended marriage ceremony was performed between them, which she believed constituted her his wife, and subsequently cohabited with

him, as his wife; whereas he was at that time a married man, and the ceremony which was performed was not such as would constitute a legal marriage between parties capable of contracting marriage, and she was not his wife.

The following seems to be all the direct evidence that applies to this part of the case:

Elizabeth Wright, plaintiff's daughter, said, referring to statements made by defendant to plaintiff when she went to see him at Terry's, when he was ill, when she advised her mother not to have anything to do with him, "I heard him say to plaintiff to keep quiet from me and he would go the States and get a divorce, and they would get married unknown to me."

Mrs. Terry, defendant's niece, said: "I had no idea of their going away to be married. Defendant was married. She knew defendant had a wife. I told her not to go away with defendant, but for all that he deceived her, that he was clear of his wife. Defendant said that if he could not get plaintiff off, he would persuade her off to spite her children. I did hear defendant say he would make plaintiff believe he was clear of his wife and get plaintiff away. Defendant's wife all the time lived about a mile and a half from my place. There had been something said of a divorce all the while. Plaintiff said she would not have defendant so long as he was bound to another woman. He said he would get a divorce, if it cost him a thousand dollars. Plaintiff knew what was right and what was wrong, as well as I did. Plaintiff, I suppose, knew defendant's wife was living not far off. Defendant was away in the States some months after this conversation."

After going to reside at Woodstock they co-habited as man and wife, he saying she was his wife. He spoke of her as his wife: they were called Mr. and Mrs. Skinner.

Now, this is the evidence from which we are to say a jury may infer that defendant represented to the plaintiff that he was an unmarried man, and that a pretended ceremony of marriage was celebrated between them, and this ceremony was of a character not to render him liable to be indicted for

bigamy. And during all this time defendant's wife was living not far from where plaintiff herself resided, and there was no pretence for supposing she was dead. We are to assume he represented to her he was unmarried, because he had said he would go to the States and get a divorce. Suppose a valid ceremony by a duly authorized person had been celebrated between them, and she had been indicted for bigamy; suppose a marriage between plaintiff and his wife now living had been proven by the minister who solemnized it; and suppose the now plaintiff in her defence gave the evidence that has been given on this trial,—would the Judge not be bound to tell the jury that there was no reasonable evidence of a divorce, or that she had been informed that there was a divorce? And the clandestine manner in which the marriage had been celebrated, and the absence of all communication with the relatives of the parties on the subject, and removal from the part of the country in which they had resided, would be strong confirmatory evidence that she had no reasonable grounds for believing that he had obtained a divorce from his former wife.

Then, as to the evidence of a pretended ceremony of marriage. It seems to be conceded that, in the absence of direct evidence of the performance of the ceremony, we cannot legally presume that a *lawful ceremony* (not a lawful marriage) took place; because we would, in the absence of direct evidence, then presume that he had committed the crime of bigamy. We could not safely presume this, because he in fact did not at any time, as far as the evidence goes, say he was *married* to her. He called her his wife, spoke of her as his wife, and co-habited with her as such; and he said before that, as her daughter testifies, he would get a divorce and marry her. These statements, in the absence of any thing to rebut them, would justify the presumption of a marriage in fact. But the fact of the former wife being alive, and that he would, if he married plaintiff, be guilty of bigamy, repel that presumption. If that be so, then would not the conclusion that defendant and some one else had entered into a conspiracy to perform a pretended ceremony

of marriage, to injure and ruin the plaintiff, be just as repugnant to the legal principle under discussion as to presume the offence of bigamy? The doctrine on that subject is thus laid down in *Best on Presumptions*, p. 64: "It is a *presumptio juris*, running through the whole law of England, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, whether *malum in se* or *malum peohibitum*, or even done any act involving a civil penalty, such as loss of dower, &c. And this presumption is not confined to proceedings instituted with the view of punishing the supposed offender, but holds in all civil and other proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally."

In none of the statements made by the defendant did he say he was married to plaintiff on such a day, and at such a place, or even that he was married at all. He said she was his wife, and she was called Mrs. Skinner. These statements were not made to the friends and connections of the parties, but to strangers, and under circumstances when it was necessary that they should at least *say* they were husband and wife, in order to be permitted to reside at a respectable hotel; and, after having taken that character in the place, and purchased a house, intending to reside there, the continuing to call her wife, and allowing her to take his name, probably became necessary, if they wished to pursue a semblance of respectability, or to live quietly there; and this co-habitation, from the evidence, seems only to have continued from the 1st of April to about the 16th of June.

The conclusions from the facts necessary to sustain the plaintiff's case seem to me to be forced, and the facts are not such as can properly be left to a jury, on which they can say that the plaintiff's case is made out.

In April or May, 1865, whilst he was a married man, separated from his wife, to the knowledge of plaintiff, she drives about the country with him from place to place, permits their likenesses to be photographed together, comes to see him when sick, and has that degree of intimacy with

him that her friends suppose he is her suitor, and her daughter advises her to have nothing to do with him, because he is a married man, and he in consequence is annoyed with the daughter, and says to the mother to keep the matter *quiet* from the daughter, and he would go to the States and get a divorce, and come back and get married to her *unknown* to the daughter. All this shews an inclination on her part to yield to his wishes, and in fact to do what he desired. It is true that she said she would not have defendant so long as he was bound to another woman, and the intimacy after that was not so marked; but, from the evidence, it would seem to have been kept up until defendant left for the United States in October. He returned in the latter part of March, and on his first visit to her, without having any proper explanation with her family, or any one else, she leaves the place where she was residing with him, and when we next hear of them they go to a hotel in Woodstock, over 100 miles distant from where she had resided, ask for lodgings, and say they are married. They remain there for two or three weeks as married people, they purchase a house, and after so living about two months there is an explosion: he says he was never married to her, and his wife is living, while she says she was inveigled by him into a fictitious marriage.

If this marriage was really celebrated (no matter in what way) in Toronto, as is pretended, and she was not aware that it was to be a mere pretended marriage, but a real one, would she not have requested the attendance of her relative, a brother or brother-in-law, who it was proven at the trial resided in Yorkville, to attend the ceremony, or require some one to be present as a witness? She had been married before, had children who were married, and, if an honest marriage was intended by her, she surely would have required some slight evidence to shew that it had actually taken place.

On the other hand, if the defendant had influence enough with her to induce her to leave her friends, and accompany him to Toronto, and go through the ceremony of this pretended

marriage without the presence of a single witness, without consulting or advising with her friends, and without any of the ordinary precautions taken by even the most unsophisticated female, would not the same influence, on his part, and absence of discretion on her part, induce her to consent to cohabit with him without such ceremony? Was he not in fact carrying out the threat, "that if he could not get plaintiff off, he would persuade her off to spite her children?" If then they were not married, and there was no ceremony of marriage between them, and yet they were cohabiting as man and wife, the motive for calling her his wife would be very apparent, and so calling her would not lead to contradictory inferences that must necessarily arise from concluding that a *marriage*, which was not a marriage, took place; and this conclusion must be arrived at before plaintiff's case can be sustained.

When a plaintiff places evidence before a jury from which they, to use the language attributed to Lord *Tenterden*, referred to in *Avery v. Bowden*, 6 E. & B. 953, can only conjecture not judge, it ought not to go to the jury: the omission is on the party offering the evidence; and if he only offered evidence consistent with either supposition of fact, he is not entitled to have it put to the jury. I think the evidence offered by the plaintiff in this case falls within that rule.

In directing a nonsuit to be entered on the reservation of this case at the trial, we are not bound to decide there was not a *scintilla* of evidence to go to the jury. If we feel that the evidence was so slight that we would set aside the verdict and grant a new trial, if the reservation to move to enter a nonsuit had not been made, or if we felt it our duty to set aside the verdict as against the weight of evidence even, according to *Avery v. Bowden* we ought to make the rule absolute. If leave had not been reserved at the trial to enter a nonsuit, and the charge of the learned Judge had been objected to at the trial, and a nonsuit refused, I think I should have been of opinion that the verdict should be set aside, and a new trial had between the parties.

Most of the authorities bearing on the question of entering a nonsuit, where there is no sufficient evidence to warrant a verdict, are collected in the able judgment of Mr. Justice *Hagarty* in *Deverill v. The Grand Trunk Railway* (25 U. C. Q. B. 517.)

On the whole, I think the rule should be made absolute to enter a nonsuit.

A. WILSON, J.—Any promise of marriage which the defendant made to the plaintiff before his return from the United States, to which he had gone for the purpose of prosecuting the divorce from his legal wife, cannot, I think, be maintained, because the plaintiff until the defendant's return from the States knew he was in fact a married man. But after his return from the States there is evidence from which it may be inferred that he told the plaintiff he had procured a divorce and was competent to marry her, and from which, coupled with what took place before he went to the States, a promise of marriage may be presumed by the jury. There was evidence, therefore, against the defendant to support the action as to the breach of promise of marriage. The facts, as stated in *Davy v. Myers* (Taylor's Rep. 127-8) shew a form of marriage to have been performed between the parties.

The law of that case it is not necessary to refer to.

Then as to the third count, which represents that the defendant practised the fraud upon the plaintiff, of inducing her to believe that he had duly married her by a legal marriage ceremony, I think there was, also, evidence to sustain it, which could not have been wholly withdrawn from the jury.

There was evidence that an engagement of marriage had been entered into between them ; that the plaintiff, however, would not marry the defendant until he was free from the woman who was then his wife ; that the defendant had declared he would make the plaintiff believe he had got the divorce and so marry her ; and that he had afterwards in fact represented this to her, and thus carried out what he

had said, that is, that he had made her believe he really was divorced and was enabled to marry her lawfully.

The parties then set off for a distance to be married, of which there is also evidence ; but from this point of the history until several days afterwards we know nothing further than that the defendant, as may be presumed, brought the plaintiff to Toronto, and in two or three days after came again for her, paid her bill at the tavern, and that they were found in Woodstock, residing at an hotel as man and wife, some few days after, and that he declared they were man and wife.

There is no actual evidence shewing that a ceremony of marriage of any kind whatever had been performed, and the question is whether this can be inferred from the facts and circumstances of the case.

If the defendant had been a single man, there was abundant evidence from which a marriage might have been presumed.

But, it is said, no such presumption can be made in this case, because the defendant was at that time a married man already, and to presume a marriage in fact with the plaintiff would be to presume the defendant would commit the criminal offence of bigamy.

The plaintiff does not assert that a marriage in fact was performed, that is, such a ceremony as would, if the defendant had been a single man, have been a valid marriage. She says an invalid ceremony was performed, that is, such a ceremony as could not have been binding if the defendant had been a single man, or which would have made him guilty of the crime of bigamy ; and she contends that this may be inferred from the facts of the case.

The defendant's answer is that such a proceeding on his part would still be an offence, and that an act of this kind is no more to be presumed against him, although it is or might be only a misdemeanor, than the act of felony.

The presumption of innocence no doubt prevails, unless and until it be overturned by stronger contrary evidence. No one saw any marriage ceremony performed, no one

speaks of it. The parties set out to be married, one of them, from the evidence, free from guilt, the other, from the evidence, with the knowledge and avowed intention of committing an improper or criminal act, that act being a ceremonial of marriage, which he knew he could not lawfully perform. The parties are subsequently found in the position in which they would be by the accomplishment of the defendant's illegal design, and in which they would be by what the plaintiff had declared would be the accomplishment of her lawful purpose; and declarations of intention are always admissible in evidence.

Then, in addition to these prior declarations of intention, made by the defendant and carried into effect apparently by and consistently with the means proposed, there is the presumption in favor of the plaintiff, which is entitled to some consideration, that she would not be guilty of acts of vice and immorality.

I do not think that all of these facts would be sufficient to establish the offence of bigamy against the defendant; but I think they may establish the fact that some ceremonial was gone through with, less than a valid ceremony in point of fact, yet sufficient in form to impose upon the plaintiff in point of law.

If the parties had been seen going into a house to be married, and when they came out the defendant had said they were married, there would, it appears to me, have been evidence in such a case that some marriage proceeding had taken place.

Now, the present case in no way differs from the one supposed but in degree; but the minor character of the evidence does not constitute it no evidence: if evidence at all, it must be considered by the jury.

The fact that the marriage, if one in any form was celebrated, was not performed among the plaintiff's friends, but at a distance from all of them, is also quite consistent with the defendant's declaration, and with his not having gone through with any ceremony sufficient in form.

He could not have carried out his design by imposing

upon the plaintiff, and he could not have made her believe that he was free from his first wife, and yet have had the marriage performed in his own neighbourhood ; for the chances were his project would have been thwarted by the exposure of his falsehoods, and he could not have had a wedding, to which all their friends were invited, without a ceremony in fact sufficient in form being performed.

But he did not mean to commit a felony ; or, he did not mean to commit it in the presence of those who could so easily prove it against him. His object was to get the plaintiff away and to persuade her by some means that she had become his wife, and yet not involve himself in the crime of bigamy.

This will quite account for the plaintiff leaving her house and her friends as she did, and for the defendant proceeding as he did also. She had nothing to excuse by not being married among her friends ; but it was everything to him that this should not be so.

That the plaintiff was too confiding and credulous is very manifest ; but all this will not lessen the defendant's guilt, if the evidence will establish it : it would be too much that he should commit an offence, and then claim to be exempted from liability on account of his own dexterity and the facility with which he had practised upon or overcome the scruples of the woman.

It is according to every day's experience that parties do not always act in a reasonable manner, but sometimes in a very extraordinary manner ; parties, too, who, it would not be supposed, could have acted in such a manner ; and we are obliged to deal but too frequently with cases of this kind.

The sole enquiry must be, was there evidence that the facts stated in the third count, were committed ? If there was such evidence, the jury had to decide upon it. In my opinion there was evidence more or less to the purpose. I could not have non-suited, and, as I think so, the rule should be discharged ; but, as a majority of the Court have arrived at a different conclusion, I cannot necessarily be very strong in the correctness of my conviction, and therefore it may be

more in accordance with the rules of law that the rule should be made absolute as directed. I am of opinion, however, free from all doubt that there was abundant evidence to sustain the cause of action for breach of promise of marriage.

J. WILSON, J., concurred with RICHARDS, C. J.

Rule absolute to enter non-suit.

MEMORANDA.

During this Term the following gentlemen were called to the Bar:—JOHN PARKER THOMAS, AMRI LEWIS MORDEN, MICHAEL WALSH, DANIEL MCCARTHY DEFOE, GEORGE DENMARK, ARCHIBALD BELL.

HILARY TERM, 30 VICTORIA, 1867.

(February 4th to February 16th.)

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

RICHARDSON V. CANADA WEST FARMERS' INS. CO.

Fire policy—Plea of arson—Evidence—Interest of juror—New trial refused

In an action against an Insurance Company on a fire policy, the defence that the insured, or his assignee, wilfully and maliciously set fire to the insured premises, ought to be as satisfactorily established to the minds of the jury, as to justify them in convicting him of the criminal charge for the same offence.

The fact that one of the jurors is a shareholder in an Insurance Company, is no ground for a new trial, in case of an adverse verdict: the plaintiff should exercise his right of challenge, if he objects to the juror's presence.

THIS was an action on a fire policy, which had been assigned, with the consent of the defendants, to one William Wood, the beneficial plaintiff.

The declaration was in the usual form, alleging the loss by fire of the property insured.

The defendants pleaded, among other pleas, that the property in question had been destroyed by the unlawful and malicious act of the said William Wood.

The cause was tried before Morrison, J., at the last Fall Assizes at Peterborough.

The plaintiff, besides proving the loss, gave evidence with a view to shew that Wood had not been near when the fire occurred. The defendants gave evidence to show that he was not at home when the fire broke out, but reached there soon after, besides other circumstances from which the jury might infer that he had fired the buildings.

The plaintiff gave evidence in reply for the purpose of rebutting the defendant's case. It was objected, on behalf of the plaintiff, that there was no evidence to connect the plaintiff with the fire to sustain the first plea.

The learned Judge reported that he left it to the jury to say whether the buildings had been burnt through the unlawful and malacious act of Wood: if so, the verdict should be for defendants: if otherwise destroyed, either by accident, or by any means other than Wood's, then for the plaintiff.

The jury found for defendants.

In Michaelmas term last, *C. S. Patterson* obtained a rule *nisi* calling on the defendants to shew cause why the verdict should not be set aside and a new trial granted, on the grounds, amongst others, of misdirection of the learned Judge, in leaving the evidence to the jury as sufficient to support the first plea; and that one or more of the jurors was or were interested, as a member or members of the defendants' corporation.

H. Cameron now shewed cause, citing *Rex v. Sutton*, 8 B. & C. 417; *Reg. v. Wardell*, 1 C. & M. 647.

Patterson, contra.—There was no evidence on which a jury could have convicted Wood of arson, and to support this plea the same evidence was necessary.

The affidavits showed one of the jury at least was one of the insurers in the company, and he had therefore some interest in the event, and though it might not be much, still he ought not to have been on the panel.

J. WILSON, J., delivered the judgment of the Court.

The defence is, that Wood wilfully set fire to the insured buildings. The jury ought to be satisfied that the crime imputed is as fully proved, as would justify them in finding him guilty of a criminal offence for the same charge: *Thurtell v. Beaumont* (1 Bing. 339). The same rule applies to other criminal charges arising in civil proceedings: *Chalmers v. Shackell* (6 C. & P. 475), *Wilmett v. Harmer* (8 C. & P. 695), *Neely v. Lock* (8 C. & P. 527), *Tay. Ev.*, 4th Ed., 122-3. The plaintiff might be tried on this finding for the criminal offence, without the finding of the grand jury: *Chitty's Cr. Pleading*, 164-5; *Rex v. Jolliffe* (4 T. R. 293), *Prosser v. Rowe* (2 C. & P. 421, note b). The direction to the jury, was that they must be satisfied that Wood wilfully set fire to the buildings.

As regards the first branch of the rule, we think, there was evidence to go to the jury that Wood did set the buildings on fire, and therefore the learned judge was right in leaving the question to them.

The last ground is, that one of the jurors was an insurer in the company, and as it is a Mutual Insurance Company, he had a direct, though it might be a small interest, in the event.

In discussing this point in the rule, it was said, and not denied, that at the trial the learned counsel for the defendants had pressed upon the consideration of the jury how proper it was to check fraud in insurers in these companies, for the safety of the whole depended upon the good faith of every insurer. We cannot say that in any view of such a case this was an improper consideration, nor indeed was it so urged upon us, excepting that, as addressed to the juror who is now challenged, it was likely to have unduly influenced him.

The case of *Williams v. The Great Western Railway Company* (3 H. & N. 869) is in point. It was a motion for a new trial, on the ground of one of the jurymen being a shareholder in the railway company and open to challenge, if the fact had been known. *Pollock*, Chief

Baron, said, "Generally speaking, where there is ground of challenge, but no objection is taken to a juror, who might be challenged, there is certainly no reason for granting a new trial.' We cannot say that there are no circumstances which would induce the Court to interfere. For instance, if there had been any arrangement to procure a shareholder to be on the jury for the purpose of influencing other jurymen, or if there had been any collusion, the Court might interfere."

On the whole, we see no ground for making this rule absolute.

Rule discharged.

SAUNDERS ET. AL V. ROE.

Lease—Effect of the term demise—Failure of lessor to give possession—Pleading.

The declaration set out a deed made between plaintiffs and defendant, by which defendant *demised* to plaintiffs certain land for a term of years from a day past, and assigned as a breach that defendant had not given plaintiffs possession, or enabled them to enter, and they had been wholly unable to obtain possession.

Plea, that by making the said deed defendant had enabled plaintiffs to enter into and obtain possession.

Held, on demurrer, that the breach assigned in the declaration was sufficient; but that it could not be sustained by proof only that defendant had not given actual possession, for it would be necessary to show that plaintiffs had attempted to get possession and had been prevented by reason of some adverse occupation, not with their consent, or by some physical impediment or hindrance placed in the way by defendant, or caused in some way to be done by his means, with intent to prevent possession being taken.

Held, also, plea bad; for that defendant was bound to do more than simply deliver the lease to plaintiffs.

Semble, that the word *demise* in a lease raises an implied covenant to give possession.

Where the demise is by deed, an action may be maintained on an implied covenant to give possession when there is any proper word to create a covenant by implication.

The declaration set out a deed, dated the 25th of October, 1865, made between the defendant and the plaintiffs, by which the defendant *demised* to the plaintiffs lot No. 3, in

the second concession of King, with some small reservations, for ten years from the first day of April, 1866, at the yearly rent of \$600, payable half-yearly; the first half-yearly payment to begin on the first of October, 1866. There was a covenant for quiet enjoyment during the term. The declaration then charged that although the said first day of April had long since passed before the commencement of the suit, yet the defendant did not, before or on the first day of April, 1866, or on any other or later day, give to the plaintiffs possession of the premises, or enable them to enter thereon, and the plaintiffs had been wholly unable to obtain possession thereof.

The defendant pleaded that by making the said deed he did enable the plaintiffs to enter into and obtain possession of the said land.

The plaintiffs demurred to the plea, because it admitted that the defendant did not deliver possession of the land to plaintiffs, and it was no answer that the plaintiffs were enabled by the demise to obtain possession; and because there was a breach of the covenant for quiet possession.

The defendant gave notice of exception to the declaration that no breach of the covenant to enjoy was shewn to have taken place by the act of the defendant, or any one claiming under him; and it was not shewn that the plaintiffs were unable to enter or take possession by reason of any act of the defendant, or any one claiming under him; that there was no covenant or agreement of the defendant to give plaintiffs possession; that their right to possession arose by the lease, and unless they were unable to obtain possession by the act of the defendant, or those claiming under him, no action lay against the defendant.

McMichael, for the demurrer:—The plaintiffs, under the word *demise*, have a remedy by implied covenant to be put in possession by the lessor: *Coe v. Clay*, 5 Bing. 440, 3 M. & P. 57; *Drury v. McNamara*, 5 E. & B. 612; *Thompson v. Crawford*, 13 C. P. 53.

[The court referred to *Ross v. Massingberd*, 21 C. P. 62; *Jinks v. Edwards*, 11 Exch. 775.]

J. H. Cameron, Q. C., contra:—The plea must be good, for it is a direct answer to the declaration. The plaintiffs have not shewn how they were unable to obtain possession: they have not shewn it was by any act or refusal of the defendant: all the defendant had to do he did do to enable the plaintiffs to enter: he made the demise to them by reason of which they could have entered.

The express covenant for quiet enjoyment restrains the operation of the word *demise*, and prevents a remedy arising on an implied covenant: *Line v. Stephenson*, 4 B. N. C. 678, affirmed in 5 B. N. C. 183; *Arch. L. & T.* 277, 284.

A. WILSON, J., delivered the judgment of the court.

The declaration states that the defendant did not give possession of the land to the plaintiffs, or enable them to enter thereon, and the plaintiffs have been unable to obtain possession thereof.

Does this state a sufficient cause of action?

In *Coe v. Clay* (5 Bing. 440) all that appears is that the defendant had agreed to let the plaintiffs certain premises, and this was an action *for not letting* him into possession, which, a preceding occupier having wrongfully refused to quit, the defendant was unable to effect. The Court said that he who lets agrees to give possession, and not merely to give a chance of a law suit, and the breach assigned being that the defendant *did not give* the plaintiffs possession, the rule for a new trial was refused. From this case it is not quite clear whether the breach was for not *letting* the plaintiff into possession, or for not *giving* him the possession. If it were in the latter form, it would be an authority in favor of the plaintiffs. The same case, as reported in 3 M. & P. 57, where the declaration is given, shews that the breach was that the defendant did not *let* the plaintiff into possession. The Court there said that the defendant was bound

to let the plaintiff into possession according to the terms of the agreement, and it was proved he did not do so.

In *Jinks v. Edwards* the breach was, that the defendant did not nor would give or let the plaintiff into possession of the premises, *but wholly refused so to do*.

In *Ross v. Massingberd* the breach was, that the defendant neglected *and refused* to allow the plaintiff to have the possession of the warehouse.

In *Thompson v. Crawford* the breach was, that the plaintiff was not permitted to take possession, "but the widow of Lundy (the lessor), claiming right to dower, was in possession and refused to give the plaintiff possession, and the plaintiff was wholly unable to obtain it."

In *Drury v. McNamara* the instrument was held not to be a lease, and therefore the tenancy and the right of entry never commenced; but it was treated, in pleading, as a lease, and the breach was just as it is in this case, that the defendant "did not give to the plaintiff possession of the farm, or enable him to enter thereon, and the plaintiff has been wholly unable to obtain possession thereof."

In all of the cases, excepting the two in our own Court, the instruments of demise sued upon were not deeds.

In the two cases in our own Courts they were deeds. In *Thompson v. Crawford*, an express covenant was set out in the declaration that the plaintiff might take possession on a particular day, and the action was brought on that covenant for refusing, under the circumstances before stated, to give possession.

In *Ross v. Massingberd*, it is not quite easy to say any more than it is in this case, from the frame of the declaration, whether the action was brought on the deed by reason of an implied covenant. The court treated it as brought upon the covenant, for it is stated that two of the Judges were strongly of opinion that "no covenant in law arises from the use of the word *lease* alone," which was the only operative word of conveyance in the lease.

It is to be inferred from this last case, that if the word

had been *demise*, as it is here, instead of the word *lease*, that an implied covenant to give possession would have arisen, and probably this is a correct view of the law: *Bandy v. Cartwright* (8 Exch. 913). See also the principle, though not the decision, in *Holder v. Taylor*, Hob. 12. No doubt, if he who agrees to let agrees to give possession, an action for breach of the agreement must lie, as well when the lease is by deed as when it is by writing only; but the question is, whether, when the demise is by deed, the remedy must or may be on the deed under an implied covenant, or must be only on the implied agreement arising in respect of the demise and collateral to it, and, therefore, upon an assumpsit, as in the case of a demise by writing only.

In the case last mentioned covenant was held to be maintainable, by reason of the word *demise*, by the lessee against the lessor, for want of title or power to demise, although the lessee had never entered, so that the word demise has an operative effect before the relation of landlord and tenant has actually been created; and if it can support an implied covenant in one case *before entry*, I do not see why it may not also do so in any other case, and therefore I am of opinion that when the demise is by deed, the action may be maintained on an implied covenant to give possession, when there is any proper word used to create a covenant by implication. When there is no such implied covenant, it is most likely an assumpsit may be maintained on the agreement which there is between the parties, that possession shall be delivered.

If it had been necessary to determine in this case whether the action is brought in covenant or in assumpsit, I might have some difficulty in deciding it, for I do not see anything which positively indicates the form of action one way or the other. From the view which I have expressed the form of action will not affect the result of the case.

I was inclined to think, on the argument, that the declaration was not sufficient—for that the giving possession, or not

enabling the plaintiffs to enter, did not disclose any breach of contract on the defendant's part, inasmuch as it was not necessary the defendant should give possession, or do any thing more to enable the plaintiffs to enter, than to deliver the deed of demise to them, and they might therefore enter without the intervention of the defendant, at their own time and pleasure; and if the breach had to be construed as meaning that the defendant, upon the execution of the lease, was bound to go to the premises and there deliver the actual possession of them to the plaintiffs, I should have held that this was not the defendant's duty, and that the declaration had not therefore truly described the nature and extent of his engagement by virtue of the lease.

I did not feel sure, as nearly all the precedents averred that the lessor had *refused* to give possession, or had not *let* the lessee into possession, and as it is not the duty of the lessor to give actual possession, that this averment of not giving possession shewed a sufficiently active failure or default against the lessor, and might not have been satisfied by the mere proof that possession in fact had not been given to the lessee.

I think that the allegation of not giving possession would not be sustained by proof only that the lessor had not given actual delivery, but that it would have to be shewn that the lessee had attempted to get into possession, and had been prevented from entering upon and occupying the premises by reason of some adverse occupation, not with his consent, or by some physical impediment or hindrance placed in the way by the lessor, or caused in some manner to be done by his means, with the intent of preventing possession being taken.

The following passages, in addition to the precedents before mentioned, created the doubt in my mind as to the sufficiency of this breach.

In *Bac. Ab.*, "Leases," it is said: "the lessor having done all that was requisite on his part (by the execution of the lease) to divest himself of the possession and pass it over to the lessee, had thereby transferred such an interest to the lessee

as he might at any time reduce into possession by an actual entry, as well after the death of the lessor as before, and such an interest as he might before entry grant over to another, or, if he died before entry, would go to his executors; or, if the grant were made to two jointly, to the survivor and his executors, any of whom might enter at their pleasure, and so reduce the contract into actual execution; for it was perfect and complete on the lessor's part, and the perfecting of it on the lessee's part was entirely in his own power, and left to his own discretion to use when and as he thought fit."

The same is said in *Cruise's Dig. Tit.*, 8, ch. 1 secs. 19-20; *Crabbe's Real Property*, sec. 1269.

I think, however, the breach is sufficient, and must be sustained by proof of the kind before mentioned.

An action could not, according to the case of *Ireland v. Bircham* (2 B. N. C. 90), have been brought on the covenant for quiet enjoyment during the term, because the term until entry has not commenced; but see *Lock v. Furze* (19 C. B. N. S. 96, 11 Jur. N. S. 726, 12 L. T. N. S. 731, affirmed in 15 L. T. N. S. 161.) Determining the sufficiency of the breach in effect determine the insufficiency of the plea; for if the mere execution of the lease is not equivalent to a giving of the possession, or the same as enabling the plaintiffs to enter, explained as these allegations have been to mean something by which the lessees, through no fault of their own, but by some fault in fact or in law of the lessor, have been prevented from entering on the property, then the plea to this breach, that the defendant made a lease to the plaintiffs, is not a denial of the breach, but an assertion that the defendant is not bound to give the possession, or to do more towards his lessee than simply to deliver the lease.

We are of opinion that he is bound to do more, and that his plea is not a proper answer to the declaration. The judgment will therefore be for the plaintiffs upon the demurrer; but, as we have not been free from doubt as to the sufficiency of the breach, the defendant should be allowed to

amend his plea and plead *de novo*, if he wish to do so. The conditions should be amending and pleading issuably and paying costs in a fortnight, and undertaking to go to trial at the next assizes, if the plaintiffs shall desire it.

Judgment for plaintiffs on demurrer.

KELLY V. IRWIN.

*Landlord and tenant—Exclusion of tenant from part of demised premises—
Abatement of rent after accrual—Right to distrain—Apportionment.*

The first and second counts of the declaration were respectively for distraining where no rent was due, and for excessive distress for rent. It appeared that defendant had leased to plaintiff for a term of years certain premises, portions of which were at the time in the possession of other parties, and that these parties retained possession against plaintiff, and refused to give them up to him. In consequence of this, defendant, *after the expiration* of the first year, agreed with plaintiff to an abatement in the rent for that year, and gave him a receipt for the balance, which plaintiff paid, as the amount of rent due upon the premises. Defendant, however, subsequently distrained for the sum agreed to be remitted.

Held, on the authority of *Neale v. McKenzie*, 1 M. & W. 763, that at the time of making the lease, and during the whole period the rent was claimed for, no legal term was created by the instrument of lease between the parties, in consequence of the adverse holding of parts of the premises and the plaintiffs exclusion therefrom, and that no right to any rent in respect of such parts had ever arisen; and that therefore, the rent could not properly be apportioned, because the tenant (the plaintiff) had never been subject to the entire rent by virtue of the demise.

Held, also, distinguishing *Watson v. Waud*, 8 Ex. 335, that the agreement between plaintiff and defendant, as to the abatement of the rent, did not create a new tenancy between them at a new rent, entitling defendant to distrain therefor; because the agreement was not made *until after the expiration* of the year to which it alone had reference, so that the relationship of landlord and tenant could not have been created for that year, and the sum agreed to be paid could not have been rent, but a mere sum in gross, and could not, consequently, have been distrained for; and, therefor, *Held*, that plaintiff could not recover on the first and second counts, which were framed upon the assumption that plaintiff was tenant to defendant at a certain rent.

Quere, whether the agreement referred to operated as a valid discharge to defendant from all damages for his breach of covenant in not giving plaintiff possession according to his deed.

This was an action by the tenant against the landlord and his bailiff for a wrongful distress.

The 1st count was for distraining when no rent was due.

2nd count, for an excessive distress.

3rd count, for selling without having made an appraise-
ment ; and the

4th count was in trover.

The defendants separately pleaded not guilty by statute
(11 Geo. II., ch. 19, sec. 21).

Issue.

The cause was tried at the last fall assizes held at Hamil-
ton, before the Chief Justice of this Court.

The lease from Irwin to Kelly was proved, dated the
20th of March, 1865, and was for four years from the
1st of January, 1865, at the rent of \$110 for the first year,
and \$120 a year for the remaining three years, the land
being lot No. 25, in the 5th concession of the township of
Ancaster. Myers occupied a dwelling house on the pre-
mises, and about an acre and a half of the land, when the
lease was made, and he had been there from that time.

There was a house, also, about the time in possession of
Morton, who continued in possession, having it locked up :
he rented the property afterwards to other tenants. Kelly
resided on the lot. Morton built the house he lived in,
and he had the right to remove it. There was a dispute
between Kelly and Irwin about the rent. Kelly was willing
to pay for what he occupied, but not for what he did not
occupy. Irwin agreed to this, and Kelly gave the witness,
David Richardson, the money, and he paid it to Irwin,
and took a receipt for it. There was an abatement of \$36
made for the first year ; \$2 a month for the house occupied
by Myers, and \$1 a month for the other house, then occu-
pied by one Boylan, who got it from Morton. The \$74
were accepted by Irwin in full, and he was satisfied. The
receipt was in these words :

“ANCASTER, 5th April, 1866.

“Received from Adam Kaley the sum of seventy-four
dollars, being the amount of rent for the land I now leased
from Robert Irwin, lot 25, in the fifth concession.

(Signed) ROBERT IRWIN.

(Signed) DAVID RICHARDSON,

Witness.”

On the 25th of June, 1866, about twenty-two tons of Kelly's hay were sold under the warrant for rent.

The distress warrant was dated the 11th of June, 1866, and was under the hand and seal of Irwin, and was addressed to Meyers, the other defendant, and directed him to make \$36, the balance of rent due on the 1st of January, 1866.

Some few days before the settlement a letter was handed to Irwin, which was as follows :

“ HAMILTON, 4th April, 1866.

Mr. Robert Irwin,

Dear Sir,—Mr. Adam Kelly is now with us, and says you are willing to abide by what we say is legal and right in regard to the amount which Mr. Kelly should pay. We of course know nothing of the value or proper rental of the several portions of the premises, but if, as Mr. Kelly says, Meyers has been in possession of a portion of the property, and you did not therefore give Kelly possession of the whole, we think an abatement should be made in the rent proportioned to the value of such parcel.

Truly yours,

(Signed) BURTON & BRUCE.”

When Irwin was told that Kelly could not get possession from the persons in occupation, he said he would stand between Kelly and all harm; he would clear the place of the whole of them. Kelly wanted to give up the place, but Irwin would not let him.

Boylan said he rented the house he occupied from Morton, and paid the rent to him. Irwin seized on the witness's goods for rent in April, 1866. Irwin claimed two years and some months' rent. He did not take anything away. He laid his hand on the furniture and said he would seize. The witness did not pay Irwin.

For the defence it appeared, that Meyers had been the owner of the lot, and had mortgaged it to Irwin; that before Kelly got his lease, Irwin and Meyers had joined in a lease to Pepper for three years at \$120 a year rent, the understanding being that Meyers should live on the place,

which he did during the whole time, and it was sought to be shewn that Kelly took his lease upon the same terms that Pepper had held it, but the Chief Justice refused to allow the lease to be varied from by mere parol testimony. Kelly lived on the next lot to the one leased to him.

The charge to the jury was to the effect to allow double the value of the property seized on the first count, and the defendant should have leave to move to enter a nonsuit or verdict upon this count, if the Court should be of opinion that the plaintiff ought not to succeed upon it according to the evidence.

That as to the second count the jury might in the meantime assess damages upon it if they found there had been any excess in the distress made.

The third count was abandoned, and as to the fourth count, they were told that they might assess such damages on it, if they found for the plaintiff, as they thought he should recover in case it was held he was not entitled to the double value, and in case it was held there was no rent whatever due.

The jury found the single value of the goods seized to be \$120, and they gave their verdict as follows: they found for the plaintiff on the first, second and fourth counts, with \$240 damages on the first count, \$10 damages on the second count, and \$120 damages on the fourth count.

In Michaelmas Term last, *M. O'Rielly*, Q. C., obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict rendered for him should not be set aside, and a nonsuit or verdict for the defendants be entered as to the first and fourth counts, or why a new trial should not be had between the parties, on the following grounds:

1. For misdirection of the learned Chief Justice in holding that the circumstances shewn as to the \$36 amounted to a payment of that amount of the rent.

2. That the verdict on the first and fourth counts was contrary to law and evidence. Or, why the verdict on the second and fourth counts should not be set aside, and a verdict on those counts entered for the defendants; or the

verdict on the first count be set aside and a verdict thereon entered for the defendants, on the ground that these counts were inconsistent with each other, the facts necessary to sustain the second and fourth counts being in contradiction to the facts necessary to sustain the first count, and the damages on either the first count or the second and fourth counts being a complete satisfaction of the whole damages sustained by the plaintiff.

McKelcan now shewed cause:—There was clear evidence of an abatement of the rent, and evidence for the jury to say whether, upon the facts, the parties considered the first years' rent settled and paid by the arrangement which had been made. There was a valid consideration for the agreement, because Kelly had a good cause of action against Irwin for not putting him in possession of the demised premises: *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775; and he gave up this in consideration of the abatement of rent, and of the new agreement which was made. The agreement can be maintained though it was the acceptance of a smaller sum, for there was a good consideration for the acceptance of the smaller sum in satisfaction.—*Hey v. Moorhouse*, 6 B. N. C. 52; *Sibree v. Tripp*, 15 M. & W. 23, 30, 32; *Langride v. Dorville*, 5 B. N. C. 117; *Norman v. Thomson*, 4 Exch. 755; *Cooper v. Parker*, 15 C. B. 822; *Lavery v. Turley*, 6 H. & N. 239; *Cook v. Wright*, 1 B. & S. 559. The rent was apportioned by the parties.—*Stevenson v. Lambard*, 2 East. 575; *Flesher v. Putman*, 6 L. J. N. S. 218; *Neale v. McKenzie*, 2 Cr. M. & R. 94, affirmed in Ex. Ch. in 1 M. & W. 747; *Watson v. Waud*, 8 Exch. 355. If the plaintiff be entitled to recover in respect of the excessive distress, he must recover some amount of damages, though only nominal; *Piggott v. Birtles*, 1 M. & W. 441; *Chandler v. Boulton*, 3 H. & C. 553, 11 Jur. N. S. 286.

O'Reilly, Q. C., contra:—There was no valid agreement made between the parties as to the reduction of the rent. Kelly still has his remedy against Irwin for not giving him the full possession of the property: there was, therefore, no

consideration for the agreement, as no cause of action was ever renounced or released: no accord and satisfaction has ever been completed.—*Reeves v. Hearne*, 1 M. & W. 323; *Collingbourne v. Mantell*, 5 M. & W. 289; *Mitchell v. Cragg*, 10 M. & W. 367; *Carter v. Wormald*, 1 Exch. 81; *Watson v. Waud*, 8 Exch. 335; *Willoughby v. Backhouse*, 2 B. & C. 821.

As to the second count, for an excessive distress, he referred to *Thompson v. Wood*, 4 Q. B. 493; *Rodgers v. Parker*, 18 C. B. 112; *Lucas v. Tarleton*, 3 H. & N. 116.

A. WILSON, J., delivered the judgment of the Court.

The case of *Neale v. McKenzie* (1 M. & W. 753) shews that at the time of the making of this lease, and during the whole period that the rent is claimed for, that is, until the 1st of January, 1866, no legal term was created by the instrument of lease between the parties by reason of the adverse holding by Meyers and Boylan of parts of the premises proposed to be demised, and the exclusion of the plaintiff therefrom; and that no right to any rent in respect of these portions has ever yet arisen.

The rent, therefore, cannot properly be apportioned, because that can never happen unless at some period the tenant has been subject to the entire rent by virtue of the demise, and the case of *Watson v. Waud* (8 Exch. 335), which is exceedingly like this one in many respects, shews that a bargain made between parties similarly circumstanced as this plaintiff and defendant were, that the occupant or tenant should pay a smaller rent in consequence of his being excluded from parts of the property, would constitute a new demise.

If this case were like the one just referred to in all material respects, we should have held that a new tenancy had been created by the agreement of April, 1866, and that a new rent had been agreed to also. But there is this material difference between the two cases: there the new agreement was made before the rent in question fell due, so

that at the day of payment the relationship of landlord and tenant was existing, and the money that became payable was rent. Here the agreement, which had relation only to the year 1865, was not made until after that year had altogether expired, so that the relation of landlord and tenant could not have been created for that year, and the sum agreed to be paid could not have been rent, but was merely a sum in gross, and could not, therefore, have been distrained for.

The sum of thirty-six dollars was never due at all, as rent or otherwise, as before stated.

The plaintiff must fail, therefore, on the first and second counts, which are framed upon the assumption that the plaintiff was tenant to the defendant at a certain rent. The third count has been found against the plaintiff already; and the fourth count, for the reasons already stated, must be found for the plaintiff; for the taking of the plaintiff's goods as a distress for rent was a merely wrongful act which could not have been justified, and is not justified in fact by the general issue under the statute of George the Second, for that statute does not apply when there is no tenancy.

The supposed difficulty as to the inconsistency of the counts is thus got rid of, and the other objections which were taken by the rule fall also. We have not considered the numerous cases which were referred to on the doctrine of accord and satisfaction, for there was no such subject of contract or contention between the parties as made it necessary to rely upon it in support of any bargain or settlement in question in this cause, although it is very likely the agreement of April, 1866, constituted a valid acquittance from all damages against the defendant which the plaintiff then had and settled for, by reason of the alleged breach of covenant of the defendant in not giving possession according to his deed. The rule will be that the verdict be entered for the plaintiff on the fourth count for \$120 as assessed thereon, and for the defendants on the other counts; and that the rule shall in other respects be discharged.

Rule accordingly.

THE BANK OF MONTREAL V. SCOTT ET AL.

Action on pro. note—Plea of usury—Admissibility of evidence—Misdirection—Usury established before 30 Vic. ch. 10, s. 5—New trial refused.

On the trial of an action on a pro. note, brought by the plaintiffs, a banking corporation, and to which defendants pleaded usury, consisting in the plaintiffs' making the note payable at a distance from the place of discount, and thereby securing a larger rate of interest, in the shape of commission, than they were legally entitled to, the plaintiffs' agent was asked by the defendants, in cross-examination, whether during the time he was in P. (the place of discount) he had directed or caused any other note to be made payable at any other place than P.:

Held, that the question was admissible.

Held, also, that the jury's not having been directed that the note sued on, being the last of a series which had always been made payable as this one was, was not tainted with usury because made payable at a distance from P., was not misdirection, but nondirection at most, which was only ground for a new trial when it produced a verdict against evidence, which had not been the case here.

Held, also, that the defence of usury having been pleaded and established against the plaintiffs, before the passing of 30 Vic., ch. 10, s. 5, was not in any way affected by that statute, and a new trial was therefore refused.

The distinction between vested rights and mere modes of procedure pointed out.

This was an action on a promissory note, dated the 29th of September, 1864, made by the defendant Scott, payable to the order of the defendant Brownlee, for the sum of \$8,500, at the Bank of Montreal in Cobourg, three months after the date thereof.

The defendants pleaded usury, upon which issue was joined.

The cause was tried at the last winter assizes for the United Counties of York and Peel before the Chief Justice of Upper Canada, when a verdict was found for the defendants.

In Easter term last, *J. Hillyard Cameron*, Q. C., obtained a rule *nisi* calling on the defendants to shew cause why the verdict should not be set aside and a new trial had between the parties, on the ground that the verdict was contrary to law and evidence, and that, on the facts stated, there was no usury on the part of the plaintiffs; and for misdirection on the part of the learned Chief Justice, in not directing the jury that the note sued on, being the last of a

series which had always been made payable as this one was, was not tainted with usury, because it was made payable at Cobourg instead of Peterborough; and for the admission of improper evidence, in allowing the defendants' counsel, in cross-examination of the witness R. G. Dallas, the Manager of the bank of the plaintiffs at Peterborough, to ask him and obtain an answer to the question, whether he directed or caused any other note to be made payable at any other place than Peterborough.

In Trinity Term last, *T. Galt*, Q. C., *M. C. Cameron*, Q. C., and *Robert A. Harrison*, for the defendants, shewed cause:—

The direction was in the very words of the judgment of the court in the case of *The Bank of Montreal v. Reynolds*, 25 U. C. Q. B. 352. The question to the witness complained of was a proper question, but it became of no consequence, for nothing came of it, the answer being, "I do not recollect." The general course of business could be enquired into, and there was a connection between this note and others of the same character, by the general course of business pursued with such notes. They referred to *Taylor on Evidence*, 4th Ed., ss. 315, 316, 317; *Gibson v. Hunter*, 2 H. Bl. 288; *Noble v. Kennoway*, 2 Dougl. 510; *Miking v. Ellis*, 6 B. & C. 145; *Redford v. Burley*, 3 Starkie, 93; *Blundell v. Howard*, 1 M. & S. 292; *Webb v. Smith*, 2 B. N. C. 793; *Roscoe's Crim. Ev.*, 4th Ed., 292. This was peculiarly a question for the jury, and the finding is justified by the evidence, and the Court will not, as this is the second trial, the jury not having agreed on the first occasion, disturb the verdict.

J H Cameron, Q. C., contra.—The question complained of should not have been allowed to be put to the witness, because it was not a proper question; for what the witness may have done in other cases, or with respect to other notes, was no evidence as to what the witness did in this case, or with respect to this note; and the answer to it was not unimportant: the answer "I do not recollect," was commented

on to the jury, and may have influenced their finding as they did.

The verdict is against the merits of the cause, and should be set aside in a case of this particular nature, and when the amount involved is so great.

The Judge should also, as requested, have told the jury that the note now sued on was the last of a series of notes which had been dealt with as this note had been, none of which had been complained of, and all of which had been paid but this, as evidence that the note had been so drawn and made payable at the defendants' request, and for their purposes. He cited *Isherwood v. Dixon*, 5 Grant, 314; *Stimson, v Kerby*, 7 Grant, 510.

A. WILSON, J., delivered the judgment of the Court.

There was sufficient evidence to sustain the finding of the jury: on this point we could not interfere. It was the second trial also. The disagreement of the jury on the first trial was rather more against the plaintiffs than for them, and to send the cause to another jury would be to send it down for the mere purpose of testing what the chance of the trial would be the next time. The case has been tried, and fully and fairly tried, and stands upon good evidence, and should not be interfered with.

The question, "whether the witness during the time he was in Peterborough directed or caused any other note to be made payable at any other place than Peterborough," was, we think, admissible. It may have been put for the purpose of testing his memory: it was a *general* question: the answer to it either way would not have settled anything with respect to the note, but it may have been rightly asked to enable the Judge or the jury to form an opinion as to the value of the witness's testimony. The answer to it, "I do not recollect," was taken as conclusive, and no attempt was made to impeach him, or to follow it up further.

The fact that the learned Chief Justice did not tell the jury in his charge that this note was the last of a series, was not a misdirection: he was not obliged to tell them so: they

had heard this stated in evidence, and the Judge was not obliged to recapitulate it. The counsel for the plaintiffs had argued upon it to the jury, so that it was already fully before them.

The summing up of the Judge is more for the jury than for the parties, and it is by no means clear that the Judge is bound to sum up at all where no question of law is involved : when there is he is bound to explain it to them ; but, under any circumstances, non-direction, which this is at the most, is only a ground for a new trial when it produces a verdict against the evidence : *The Great Western R Co. v. Fawcett* (9 Jur. N. S. 339); *Ford v. Long*, (7 H. & N. 151). The case was before us upon demurrer, and we were prepared to have given judgment, but the plaintiffs elected to withdraw the demurrer and take issue. The case has now been twice tried, and every effort has been made, and every desire has been manifested by all concerned in so important a case, to have a full and impartial trial. One trial was not in favor of the plaintiffs, the other has been against them. We can see no failure or miscarriage of any kind, and according to the rule in such a case we have no right to interfere with the verdict rendered. The rule will be discharged.

This was the opinion the Court had formed before the passing of the late act (30 Vic., ch. 10); but before pronouncing it the statute was passed and was brought to their attention by the counsel for the plaintiffs, and feeling that they ought not to pronounce a judgment against the plaintiffs, if the statute declared that no such cause for judgment against them any longer existed, the rule was enlarged and directed to be specially spoken to on this point.

Galt, Q. C., and *Harrison*, therefore, now shewed cause. They contended that the statute in question referred only to such banks as came under the terms of that statute by surrendering their power to issue notes, and it did not appear that the plaintiffs had surrendered their power; and that the section relied on by the plaintiffs, which was in the following words, had not a retrospective operation :

Sec. 5. "No bank shall after the passing of this act be

liable to any penalty or forfeiture for usury under the 9th sec. of ch. 58 of the Consol. Stat. of Canada, intituled "An act respecting interest," but the amount of interest or commission which such banks can receive shall remain as limited by the said chapter."

They referred to *Moody v. Corbett and others*, 5 B. & S. 859, 881, Affirmed in Exch. Cham. 1 L. R. 510; *Moon v. Durden*, 2 Exch. 22; *Wright v. Greenroyd*, 1 B. & S. 758; *Evans v. Williams*, 11 L. T. N. S. 762.

J. H. Cameron, Q. C., contra, referred to *The India*, 33 L. J. Ad. 193, 12 L. T. N. S. 316; *Hitchcock v. Way*, 6 A. & E. 943; *Freeman v. Moyes*, 1 A. & E. 338; *Paddon v. Bartlett*, 3 A. & E. 884; *Surtees v. Ellison*, 9 B. & C. 750; *Jaques v. Withy*, 1 H. Bl. 65.

A. WILSON, J., now said :—

The section of the act referred to has found its way very oddly into the statute where it is placed. The act is intituled "An Act to provide for the issue of provincial notes," and every section has relation to this intituling but the one in question, which has no relation whatever to the intituling, preamble, or general purport of the act.

It must be given effect to, however, just as that "most pernicious regulation which all but ruined the butter trade of Cork, which was contained in "an act for better paving and lighting the streets, and for other purposes," : 4 Law Mag. 20; and it is perhaps better entitled to a place there than the 8th sec. of the 22 Vic. ch. 40, providing for the qualification of persons in municipalities, was entitled to a place in that act, which related to "the effecting of local improvements in cities;" and it is by no means so incongruous as the 22 Geo. II., ch. 40, which provided "for piers upon the Thames, for the regulation of attorneys and solicitors, and the assize of bread, for preventing the spread of the distemper among horned cattle, for the more frequent return of writs in Chester and Lancaster, for levying executions against the hundred, and for allowing Quakers to make affirmation."

The rule in the application of statutes is "*Nova constitutio futuris formam imponere debet non præteritis*:" 2nd Inst. 292, and referred to and commented on in *Moon v. Durden*, and there it was held that the statute then under consideration should not be construed to have relation to an existing suit, although the words used were that no suit should be brought *or maintained* upon any of the contracts legislated against.

It was said to be contrary to the first principles of justice to punish those who have offended against no law; and to take away existing rights was in the nature of punishment.

The case of *Hitchcock v. Way* is equally plain in its language, and the case of *Ross v. Farewell* (5 U. C. C. P. 101). There is nothing whatever in any of the cases which were referred to which at all shakes what *Pollock, C. B.*, in *Wright v. Hale* (6 H. & N. 230), described the maxim of "*Nova constitutio*," &c., to be, "the great constitutional principle."

This last case shews very plainly the distinction between vested rights and mere modes of procedure: the former are never allowed to be interfered with by subsequent legislation, unless there be something on the face of the statute putting it beyond a doubt that the legislature meant expressly to interfere with them; the latter must at all times be governed by the state of the law as it is when the proceeding is taken.

I refer also to *The Ironsides* (1 Lush. 458, 31 L. J. Adm. 129); *Williams v. Smith*, (4 H. & N. 559); *Jackson v. Wooley* (8 E. & B. 784); *Regina v. St. Sepulchre Northampton* (5 Jur. N. S. 867); *Marsh v. Higgins*, (9 C. B. 551).

Our opinion is that the defence of usury, which the defendants had pleaded, and which the jury had found against the plaintiffs before the passing of this statute, has not been in any way affected by the passing of the statute, and that the rule should therefore be discharged.

Rule discharged

RALSTON V. HUGHSON.

Purchase of land by execution creditor—Ejectment—Evidence.

Held, following *Delisle v. Dewitt*, 18 U. C. 155, *McNeil v. Roe*, 7 C. P., p. 191, *Field v. Livingstone*, 17 C. P. 15, that in ejectment, under a Sheriff's deed, by the execution creditor (the vendee of the Sheriff) against the debtor, the plaintiff need not prove the judgment, but may rely on proof of the Sheriff's deed and sale by him under the *fi. fa.* lands.

Doe Bland v. Smith, 2 Stark. 199, referred to.

In this case the plaintiff produced the original judgment, but, upon its being objected that it was not stamped, he withdrew it by leave of the Court, and rested his case upon the *fi. fa.* lands:

Held, that the judgment having been withdrawn as evidence by leave of the Court, must be considered as if it had never been offered.

Seem, that defendant's proper course, if he desired to show the invalidity of the judgment, and the execution issued under it, was to have given it in evidence himself.

EJECTMENT for the east half of lot 18 in 3rd Concession of the original township of Loughborough, now in the township of Stonington.

The defendant appeared and defended for the whole of the lot.

The plaintiff claimed the lot by virtue of a deed from the Sheriff of the County of Frontenac.

The defendant, besides denying the title of the plaintiff, asserted title in Edward H. Hardy, by virtue of a mortgage deed given by defendant to Hardy and the possession of the defendant as the tenant, at the sufferance and will of the mortgagee.

The cause was taken down to trial at the last Assizes for the County of Frontenac, held before *Draper*, C. J.

The plaintiff first put in an exemplification of a judgment, entered 14th February, 1865, in the County Court of the County of Frontenac, for \$254 91 damages, and \$16 40 costs, against Hughson, the defendant; a *fi. fa.* goods dated 23rd July, 1865, and returned *nulla bona* 3rd March, 1865, and a *fi. fa.* lands received by the Sheriff the same day. He also produced a deed from Thomas A. Corbett, Sheriff of the County of Frontenac, under a sale by him under the *fi. fa.* against lands, made on the 17th March, 1866, under the hand and official seal of the Sheriff, and dated 30th March, 1866.

It was objected that there were no stamps on the judgment which was produced, and, being the original judgment, the Chief Justice was of opinion it ought not to have been there. On this objection being raised, the counsel for the plaintiff withdrew the original roll and rested his case on the writ.

The defendant's counsel then objected that, as the plaintiff named in the writ of execution was the purchaser and was now suing, he must prove the judgment.

The learned Chief Justice directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him.

In Michaelmas Term last, *Sir Henry Smith*, Q. C., obtained a rule *nisi* calling on the defendant to show cause why a verdict should not be entered for the plaintiff, pursuant to leave reserved. This rule was enlarged until this term, when *Sir H. Smith*, in the absence of the defendant's counsel, supported the rule:—

The now defendant was the defendant in the original action, and the production of the writ of execution is sufficient evidence of a valid judgment as against him; for if the judgment were not so, he could either show it, or should have set it aside, or have set aside the writ: *Roe v. McNeil*, 13 C. P. 192, and the cases therein cited, and *Field v. Livingston*, 17 C. P. 31, sustain this view.

During the term *Britton* shewed cause:—

The judgment was produced at the trial, and the learned Judge's notes show it was without the necessary stamps, and under Prov. Stat. 27–28 Vic. Cap. 5, Sec. 13, the judgment was void, and the Judge was bound to take notice of this. It was not necessary for defendant to produce the judgment to show it was void.

RICHARDS, C. J., delivered the judgment of the Court.

In *Delisle v. Dewitt*, (18 U. C. 155) the late Chief Justice of Upper Canada said: "When the plaintiff (who was also the plaintiff in the original action) produced a Sheriff's

deed made under a *fi. fa.* against lands, and proved a sale under the *fi. fa.*, both good, for anything that appeared to the contrary, he shewed a good *primâ facie* title, and if there was anything done irregularly, which would affect the title, it should have been shewn." In *Roe et al. v. McNeil*, (13 U. C. C. P. at p. 191) the present Chief Justice of Upper Canada, in giving judgment, referring to the decisions of our own Courts as establishing various points in relation to Ejectment, amongst other things says, "That as between the parties, debtor and creditor, proof of the *fi. fa.* against lands is sufficient without proof of the judgment." A similar doctrine is laid down in the more recent judgment of this Court in *Field v. Livingston*, (17 C. P. 31.) In *Taylor on Evidence*, (2 Ed. 1356) the general rule as to the vendee of the Sheriff only being obliged to shew a *fi. fa.* in any proceeding as to the execution debtor, is referred to as being well established. The author adds, "Perhaps, however, the rule does not apply when the purchaser from the Sheriff is the execution creditor; and Doe *ex dem. Bland v. Smith* (2 Stark. 199) is referred to. That was an action of ejectment. Plaintiff relied for proof of title on a sale under a *fi. fa.* issued against the defendant at the suit of Bland, the lessor of the plaintiff. The writ was produced and the sale proved. On the part of the defendant, it was contended plaintiff must prove the judgment as well as the writ; that the lessor was privy to his own judgment, and therefore any rule in favor of a stranger did not apply to the case. Wood, Baron, thought the proof sufficient without proof of the judgment, but reserved the point. At the foot of the case it is stated: "The Court of King's Bench was of opinion that the judgment ought to have been proved, and directed a nonsuit to be entered." This is the only report of the case I have seen.

The distinction attempted to made, when the plaintiff in the original action is a purchaser under the Sheriff, does not seem to have been taken in the cases referred to in our own Courts; and I see no really good reason why it should exist. If both parties to an irregular judgment are willing that it

should so remain, I see no reason why any general rule of law should be changed in order to benefit a defendant who is content to allow such judgment to stand, or who feels that a demand is only being enforced against him which is just in itself, and which the judgment existing against him ought to be able to enforce, and which, probably, if objected to, would be amended, so as to make it effectual for all purposes.

Though this point was expressly taken at *Nisi Prius*, it was not argued before us, the learned counsel for the defendant probably considering that we would abide by the views expressed in the decided cases in our own courts.

The judgment having been withdrawn as evidence, by leave of the Court, must be considered as if it had never been offered, and plaintiff's case would then rest on his execution, which seems regular, and the Sheriff's sale under it valid. If defendant had desired to show the judgment was void, and any execution issued under it void also, he could himself have given the instrument in evidence, and if it appeared to be void, he would have been in a position to raise the point that the execution and sale under it were void also.

The learned counsel for the defendant, on the argument was under the impression that he had offered at *Nisi Prius* to prove the judgment himself in order to show it was void for not being stamped, but that the Chief Justice had intimated that was not necessary, as it would appear on his notes that such was the case. There is no memorandum on the Chief Justice's notes that the defendant so wished to give the judgment in evidence, and the substantial objection is taken at the close of the case, that the present plaintiff, being also plaintiff in the original action, was bound to prove the judgment, and no reference is made in the notes after the close of the plaintiff's case to any objection by plaintiff's counsel that the judgment is void.

On the whole, we think, the rule must be absolute to enter a verdict for the plaintiff.

Rule absolute to enter verdict for plaintiff.

MILLER V. WILEY, ET AL. (a)

Dower—Sale of husband's estate by Sheriff—Conveyance by husband and wife—24 Vic. ch. 40, sec. 19—Right of demandant to recover.

After recovery in ejectment against the husband by the purchaser at Sheriff's sale of the husband's estate in the land in question, but before judgment entered, and while the husband was in actual possession, his wife joined with him in a conveyance in fee of the land, by way of bargain and sale, to a third party, thereby releasing to the latter, for the consideration of five shillings, her dower, and all right and title thereto, and all manner of actions, &c., of dower. No money consideration passed, the grantee executing a mortgage back for the whole of the purchase money mentioned in the deed to him, and the husband remaining in possession until dispossessed by the Sheriff under process in the ejectment suit. The defendants, the tenants of the land, claimed under the purchaser at Sheriff's sale:

Held, that the demandant was entitled to her dower in the land in question; for that the husband not having at the time the estate he professed to grant, nothing passed by his deed, and the release of the wife, as incident to, fell with it, as there was nothing upon which it could attach; and that it must be implied that the release of dower referred to by 24 Vic. ch. 40, S. 19, must, to be binding on the wife, be contained in a deed made for the principal purpose of the husband conveying his interest to a purchaser, and in which the wife joins merely for the purpose of releasing dower, by way of extinguishment, in the land, and does not apply where the release is made to a stranger, when the husband had no estate in the land, and the dower or right thereto was solely dependent on that estate, and was not intended to be the subject of the conveyance; that though the bargainee acquired an estate as against the husband, and perhaps against the wife also, by estoppel, the defendants being no parties to the deed, but claiming adversely to it, could not therefore by this deed conclude the demandant from saying she had not released her dower to a purchaser.

Quere, whether husband and wife can at law convey the right of dower as a distinct subject of bargain and property; or whether she herself can do so after his death and before the assignment of it. If so, *semble*, that the remedy should be pursued by the assignee in his own name.

This was a case stated in an action of dower.

It was stated that the husband of the demandant was in his lifetime seised in fee of the land.

That his interest in the land was in his lifetime sold by the Sheriff under several writs of execution.

That after the recovery of a verdict in an action of ejectment, brought by the purchaser at the Sheriff's sale against the husband in his lifetime, but before final judgment, and while the husband was in the actual possession, he, by an indenture of bargain and sale, made between himself, of the

(a) The report of this case ought to have appeared amongst the Michaelmas Term judgments, but was omitted by mistake.

first part, the demandant of the second part, and one James Monroe Miller of the third part, for the alleged consideration of £3525, purported to sell and convey the land in question, in fee simple, to the party of the third part, in which indenture the demandant, in consideration of the sum of five shillings, released her dower and right and title of dower, of, in, to, and out of the land in question, and all manner of actions and writs of dower in relation thereto, to the party of the third part.

That at the time of the execution of this indenture James Monroe Miller executed a mortgage in fee of the said land to the husband of the demandant, in fee, purporting to secure the payment of the sum of £3525.

That no money consideration whatever passed between any of these parties, the purpose of that conveyance and mortgage being to compel the purchaser at Sheriff's sale to bring another action of ejectment, in which James Monroe Miller should be defendant, in the hope of defeating the said purchaser.

No such action was brought, and nothing was ever done upon the deed and mortgage.

That the husband remained in possession until the 26th of January, 1853, when he was dispossessed by process issued in the said action of ejectment, and he died in the year 1862, and no dower or compensation thereof had ever been rendered to the demandant.

That at the time of the execution of the deed and mortgage neither the husband nor James Monroe Miller had any estate or interest in the land in question, otherwise than as it may have arisen out of the claim to dower, or the possession, or by estoppel, but the husband was in possession, and in receipt of the rents and profits, and claimed to be entitled thereto; and James Monroe Miller, being the assessor for the year 1853, assessed the said land in his own name as owner, but he never was in possession, nor in receipt of the rents or profits.

That the tenants did not claim title under the deed or mortgage aforesaid, but claimed title adversely thereto and

solely through the purchaser at Sheriff's sale, and this action was brought for the benefit of the demandant, or for the benefit of James Monroe Miller, or of such other person as might be entitled to the beneficial interest in the said dower.

The question was whether, upon the facts stated, the demandant was entitled to recover dower out of the said land.

In Michaelmas Term last, *Edward Martin* appeared for the demandant:—

The 24 Vic. ch. 40, sec. 19, provides that no action of dower shall be brought in case the claimant joined in a deed to convey the land or release dower therein to a purchaser.

The question is, who is a *purchaser*?

The Consolidated Statutes for Upper Canada, ch. 82, sec. 14, declare that the purchaser in that act [respecting real property] shall be the person who last acquired the land otherwise than by descent or by partition.

James Monroe Miller is not a purchaser, because Andrew Miller had no estate to convey, and it was not intended that any estate should be conveyed. There was no actual consideration, but a nominal one only between the parties, and at most the conveyance must be considered as a release of the wife's dower; but it cannot operate as a release, because James Monroe Miller was not in possession of the land, and had no estate upon which it could operate: *Cameron v. Gunn*, 25 U. C. 77.

The deed being void, the release of dower falls with it: *Bank U. C. v. Thomas*, 2 Error and Appeal, 502.

If the effect of the conveyance was merely to transfer the demandant's right to dower, she is entitled to sue for it for the benefit of the assignee: *Jeffs v. Day*, 1 L. R. Q. B. 372, and the cases cited in this same suit in 16 C. P. 529.

The demandant is entitled to dower either for herself or for the person who may have the beneficial title to it, for she has never given it up so that it can be said to be extinguished.

But, even if she did part with it, these defendants, who do not claim under, but adversely to her, are not entitled to

set up her conveyance as a bar—firstly, because they do not claim under her, and, secondly, because she did not convey for the purpose of merging her dower in the inheritance.

McKelcan, contra :—

The demandant is estopped from saying her husband had no estate in the land when he conveyed to James Monroe Miller : *Co. Litt.* 352 *a* ; *Tay. Ev.* 4 ed. 103.

This conveyance by the husband enabled the wife to transfer her dower, and, the husband's estate being defeated, the right to dower went with it : *Ham v. Ham* 14 U. C. 497.

The release of dower to James Monroe Miller, who by the husband's deed acquired the *jus possessionis*, enures to the benefit of the person who has the *jus proprietatis* : *Co. Litt.* 266 *a*.

The provision of the statute 2 Vic. ch. 6, secs. 3–4, and 24 Vic. ch. 40, sec. 19, apply to this case : *Hill and Wife v. Greenwood*, 23 U. C. 404.

Martin, in reply, referred to *Bac. Ab.* "Extinguishment," 149 ; *Park* on Dower, 196.

A. WILSON, J., delivered the judgment of the Court.

In the former case we were of opinion the tenant could plead to a count in dower that the demandant had joined her husband in a deed of the lands out of which dower was claimed to a purchaser, in which the demandant released her dower, and that such a plea was a good bar ; that we could not assume the demandant was suing for the benefit of an assignee of her dower, and if such were the fact, and it was a good answer at law, she should have replied that fact to the plea.

It is to be implied that the release of dower referred to by the statute, must, to be binding on the wife, be contained in a deed made for the principal purpose of the husband conveying his interest to a purchaser, and in which the wife joins merely for the purpose of releasing her dower, by way of extinguishment, in the land, and that it does not refer to the case of the release being made to a stranger when the

husband had no estate in the land, and the sale of dower, or right to dower, was solely dependant upon that estate, and was not itself intended to be the subject of the conveyance.

In such a case, if the deed of the husband be inoperative or void, the *release*, as incident to it, must fall with it, for there will be nothing upon which it can attach.

Here the husband had not the estate he professed to grant: nothing in fact passed by it: the bargainee acquired an estate as against the bargainor, and, we assume, against his wife also, by estoppel; but these tenants are no parties to the deed: they claim adversely to it, and not by it: they therefore cannot conclude the demandant by this deed from saying she did not *release* her dower to a *purchaser*.

If the husband could be considered as in the light of a disseisor. when he conveyed to his son, the release of dower contained in a deed passing an estate founded upon disseisin would have been an effectual release, because the conveyance would have passed an actual estate at law, and would have enured to the benefit of the actual owner of the land whenever he determined the disseisin by the recovery of his rightful estate: Co. Litt. 262 *a*; *Burton's Real Property*, 22; *Buckler's case*, 2 Co. 56 *a*, and note *P* of the edition of 1826.

There is no kind of evidence from which a disseisin could be inferred, and the *bargain and sale* did not create it.

We express no positive opinion whether the husband and wife could at law assign the wife's right of dower as a distinct subject of bargain and property, or whether the wife herself could do so after her husband's death before it was assigned to her. The language of the 5th section of chapter 90 of the Consolidated Statutes for Upper Canada is very comprehensive, and may include the sale of such a right.

We are not required to say anything upon it, because this was not a sale by the husband and wife of any such right, nor was it intended by them for any such purpose.

If they could have sold it, and had sold it, the remedy should probably have been pursued by the assignee of it in

his own name. But no objection is desired to be taken for any defect of parties, for if dower be recoverable in law, it is conceded that judgment may be entered in her favor for it, however she may have to deal with it afterwards.

We think she never did, in fact, release her dower, and certainly not in a manner which these tenants, strangers and adverse parties, can take the advantage of. Our answer, then, to the question submitted to us is, that the demandant is entitled to recover her dower out of the lands in question in this suit. Judgment will therefore be for the demandant.

Judgment accordingly.

KILBRIDE V. CAMERON.

Fraudulent conveyance of land—Immunity of aftergrown crops from seizure under execution against vendor—Misdirection—New trial refused.

Though a sale of land may be fraudulent as against creditors, still, where the evidence shewed that the execution debtor (the vendor) had not raised the crops, the subject of the seizure, or furnished the means of doing so, but the labor and means had been contributed by the vendee alone, *Semble, J. Wilson, J., dissentiente*, that the crops were the sole property of the vendee as against the execution creditor.

Interpleader to try whether certain wheat crops and hay in stack and standing spring crops were the property of the plaintiff as against the defendant, who was an execution creditor of John Kilbride, the father of the claimant.

The seizure was made in June of 24 acres of hay, 16 acres of wheat, and 4 acres of peas, growing upon lot No. 11 in the 6th concession of the township of Metcalfe.

It appeared that John Kilbride, the father, formerly owned this lot. He conveyed it, and it afterwards came to his son Thomas, who devised it to his brother Patrick, who conveyed it to the plaintiff.

The devise was on the 11th of September, 1863. Patrick got the land, subject to the mortgage then upon it, and subject to the maintenance of his father and mother during

their lives upon the land, and to the payment to each of them of \$10 annually for their lives, and subject also to a legacy of \$100 to his brother James, and \$400 to his sister Margaret, and to the maintenance of Margaret during the lives of his parents, if she chose to reside with them and take care of them.

On the 15th of May, 1865, Patrick conveyed to the plaintiff, subject to all claims and charges on the land of what kind or nature soever.

When the father conveyed the land, it was to one of his sons, though to which of them does not clearly appear, and the consideration was that the son was to pay the father \$500, and also pay all his debts.

John, the father, and James, the claimant, lived on the land at the time of the seizure by the Sheriff. The father had put in no crops for the last seven years. He was upwards of eighty years of age. There was a bond given by the son, to whom the father conveyed, to support the father and mother for life, and to pay to each of them yearly \$10 for life.

Patrick, the brother of the claimant, first claimed the crops seized as his about the 29th of August: he was not living on the land.

It was contended at the trial, for the defendant, that all these conveyances and transactions were fraudulent and voluntary, and were not intended to pass the land in fact, but were merely colorable.

The Chief Justice of this Court, before whom the case was tried at the Assizes, held at London, in the Fall of 1865, was of opinion that the evidence shewed the intention was to pass the property in the land, and that there was no evidence whatever which he could leave to the jury, upon which they could be asked to find whether it was the intention of the parties to pass the property or not. He was, also, of opinion that even if the conveyances could be impeached as fraudulent, still the grain and crops raised upon the land by the present plaintiff, or by his brothers acting for and with him, by their labor and at their expense, could not be seized

by the Sheriff on the execution in question to satisfy the father's debts, and he directed a verdict for the plaintiff.

The defendant's counsel objected to the charge.

In Michaelmas Term, 1865, *J. H. Cameron*, Q. C., obtained a rule *niſi* calling on the plaintiffs to shew cause why a new trial should not be granted for misdirection, in telling the jury that on the facts proved, though the defendant should shew the conveyance, under which plaintiff claimed, was fraudulent and void against creditors, and defendant was established to be a creditor, and the execution debtor remained all the time in possession of the land, there was not evidence to go to the jury against the plaintiff's right to recover the crops which had been grown upon the land, and which were the subject of the interpleader.

In Trinity Term last, *M. C. Cameron*, Q. C., shewed cause. He contended the crops in question could not be seized by the defendant, even although the land might have been fraudulently conveyed by the father to his son.

J. H. Cameron, Q. C., supported the rule:—The father, the fraudulent grantor, had remained in possession of the land ever since he made the fraudulent deed, in 1857. This possession was evidence of fraud in the deed, and his possession was, also, evidence of the crops being likewise his property. He referred to *Tennery v. Burnham*, 10 U. C. 8; *Wilson v. Wilson*, 8 C. P. 525; *Wilson v. Shier*, 6 Grant 630.

A. WILSON, J.—The question of *bona fides* between the father and son, and between the one son and the other, as to the land, does not very materially enter into the merits or subject of this suit; because it might be conceded for the purposes of this inquiry that these transactions as to the land were not valid as against the creditors of the father, and yet that admission would by no means determine the right of property to the crops in question.

The evidence shows that the father did not raise the crops, or furnish the means for doing so: the labor and means

were contributed by the sons alone. Unless, therefore, it were to be held that when the land was fraudulently transferred, the crops which were raised upon it by and at the sole expense of the fraudulent vendee, could be seized as the goods and chattels of the vendor, I would not be able to say that the property in dispute in this case was the property of John Kilbride, the execution debtor, and was liable to be taken for his debts.

No doubt the parties intended to pass the estate in the land by the different conveyances produced, and there was no proceeding whatever which directly impeached the land transfer, for the execution was against goods, not against lands.

If the validity of the deeds of the land could have been directly disputed, it is, perhaps, not quite clear how far the *devise*, which forms a part of the alleged fraudulent title, could have been affected by the same evidence. The devise was, we should think, quite a *bonâ fide* conveyance. The devisor undoubtedly intended to pass the estate in the land to the devisee, and he did pass it, and in doing so, having charged the land with various burdens, which the devisee has assumed to discharge, and has so far, in part, at least, discharged, the devisor has thus exacted an actual and valuable consideration from the devisee, which would clearly support the prior fraudulent deed, unless both devisor and devisee can be charged with notice of its fraudulent object.

The crops, I think, were upon this evidence the sole property of the plaintiff in this case as against the execution creditor, and, I think, the rule should be discharged.

J. WILSON, J.—If, as between the father and sons, the land did pass by conveyances which, as against creditors, were fraudulent and void, the crops would not belong to the father; but if, as was contended, the whole was colorable only, and the evidence rather points to this, then the crops were the property of John Kilbride. It was a question for the jury to say how it really was, and this question, I think, in deference to the opinion of the learned Chief Justice, should have been so left to them.

There ought, therefore, in my opinion to be a new trial, costs to abide the event.

RICHARDS, C. J., before whom the cause had been tried, expressed an opinion in favor of the view of A. Wilson, J., but he took no part in the judgment, as he had not been present at the argument. The Court therefore being equally divided, the rule taken out could not be discharged, but fell through, and the verdict consequently stood.

WHITE V. CUTHBERTSON.

Insolvency Act of 1865, sec. 2—Assignment by resident in Upper Canada to Assignee in Lower Canada—Pleading.

Held, on demurrer to the plea set out below, that the Insolvency Act of 1865, sec. 2, does not authorize a voluntary assignment to be made to any official assignee in any part of either Upper or Lower Canada: the obvious meaning of the act is, that the insolvent may make an assignment to any official assignee entitled to take it under the Insolvent Act of 1864, without complying with any of the formalities or publication of the notices mentioned therein.

The plaintiff sued as assignee of the estate, &c., of John Davidson, an insolvent under the acts of 1864 and 1865, for money payable for goods sold and delivered by Davidson before his insolvency to defendants; work done, &c.; money received; interest forborne, &c.; account stated.

PLEA—That John Davidson, the said insolvent, under the Acts of 1864 and 1865, made a voluntary assignment under said Acts, and at the time of making said assignment resided at Bruce Mines, in the District of Algoma, and that the plaintiff was official assignee under said Acts for the City of Montreal; that said assignment was made to plaintiff although residing in another County or District, and without the formalities and notices required by the Act of 1864; and that it was therefore invalid as a voluntary assignment under said Acts, and that defendant was still liable to pay to insolvent, &c.

DEMURRER.—1. That the plea confessed without avoiding the cause of action. 2. That the facts stated on the face of the plea shewed that plaintiff was validly appointed assignee.

E. Martin, for the demurrer, cited Insolvent Act of 1864, sec. 2, sub-sec. 4, sec. 12, sub-sec. 5, sec. 3, sub-secs. 4, 14; Consol. Stat. U. C. ch. 26, sec. 18; 29 Vic. ch. 18; *Gottwalls v. Mulholland*, 15 C. P., 711, S. C. 3 Err. & App. 97; *Dwarr*, 707; *Rex v. Boulton*, 8 B. & C. 74; *Hingston v. Campbell*, 2 U. C. L. J. N. S. 299; *Bloxam v. Elsie*, 6 B. & C. 176, per *Bayley*, J.

Burton, Q. C., contra, cited *Edgar's* Insolvent Act of 1864, sec. 2, sub-sec. 8, sec. 3, sub-secs. 10, 17, 22, sec. 4.

J. WILSON, J., delivered the judgment of the Court.

By the Act respecting Insolvency (of 1864, sec. 2, sub-sec. 4,) an insolvent was authorized to make an assignment to any official assignee resident within the county within which the insolvent had his place of business, and nominated for the purpose of that act by the Board of Trade in such county; or, if there was no Board of Trade therein, then by the nearest Board. This assignment could only have been made when the formalities of the preceding sub-sections of the act had been complied with. By the act to amend the Insolvent Act of 1864, passed in 1865, sec. 2, "a voluntary assignment may be made to any official assignee appointed under the said act, without the performance of any of the formalities, or the publication of any of the notices required by sub-sections one, two, three and four of section two of the said act."

The contention of the plaintiff here is, that this act of 1865 authorized a voluntary assignment to be made to any official assignee in any part of either Upper or Lower Canada; but we do not read it so. We think the Legislature, by this clause, meant only to relieve the insolvent from performing any of the formalities, or publishing the notices mentioned in the former act, preliminary to the making of an

assignment. The obvious meaning is, that the insolvent may make an assignment to any official assignee entitled to take it under the former act, without complying with any of the formalities or publishing the notices mentioned therein.

The acts were passed with a view to insolvency in one part of the Province and bankruptcy in the other, and were to be administered in Courts differing widely in their jurisdictions, modes of procedure, and systems of law. It is true, the creditors may choose their own assignee, but in that case there is no doubt in what Court the estate is to be administered; but if the insolvent had the right to appoint any assignee, and, residing in Upper Canada, as in this case, he chose his assignee in Lower Canada, in what Court, or under what system of law, is his estate to be administered? It appears to us, that if the Legislature had intended to give this right to the insolvent, some provision would have been made in this respect, but we find none.

In *Hingston v. Campbell* (2 U. C. L. J., N. S. 299) the learned Chief Justice holds this view, although his reasons do not appear in the report; but, indeed, it seems so plain as to preclude the necessity for a reason for this construction.

There will be judgment for the defendant on the demurrer: we think the plea is a good answer to the action.

Judgment for defendant on demurrer.

THOMPSON v. BENNETT.

Action for use and occupation—Evidence.

In an action for use and occupation the evidence offered was, that one V. conveyed the land in question to plaintiff as trustee, but the trusts declared by the deed were repudiated, and the deed destroyed by plaintiff, under the belief that he had thereby extinguished the trust. Plaintiff made no claim to the land, nor did anything until several years afterwards, when he forbade defendant paying rent to any one until a Chancery suit, then pending, should be settled. During his interview on this occasion with defendant, the latter's wife had in her hand a lease from another party, under which the rent was payable, and under which defendant held the land. Defendant said he would deposit the money in the bank until the suit was settled, and would then pay to plaintiff, if he was the proper person to receive it. Nothing further appeared to have occurred for about five years, when plaintiff applied to defendant for rent, whereupon defendant answered that he had it not then, but would pay part when he had got it; and on a subsequent and similar application defendant replied that he would pay part of it if he had it: *Held*, that the rent spoken of was the rent payable under the lease, not as rent for the occupation under plaintiff, for it did not appear that plaintiff had ever asserted title to the land as landlord; that the evidence pointed to defendant's willingness to attorn to the right claimant of the land, not to the fact that he was occupying under plaintiff; and that the promise was to pay the rent under the lease referred to at the first interview, and was not, therefore, evidence to shew an occupation under plaintiff, but an assertion of holding by deed, which by the statute precluded this form of action.

Seemle, that if plaintiff had at that time asserted title in himself, or had claimed the land, what passed would have been evidence of attornment; but that if defendant had attorned this action would not lie.

This was an action for use and occupation of messuages and lands of the plaintiff by the defendant, and, as appeared by the particulars, for the use and occupation of the east half of the west half of lot number 8 in the 10th concession of the township of Monaghan, from the 1st March, 1860, till the 1st March, 1866.

The plaintiff's case was that one Vanstine had been in possession of the land for many years before he left, about ten years ago; that Vanstine and his wife had separated; that the plaintiff got a conveyance of this land in trust for the use of Vanstine and his wife, but the deed was not produced, and how the title really was did not appear; that the defendant had gone into the occupation of this land about seven years ago; that in February, 1861, plaintiff had called upon defendant and forbidden him from paying rent to any one until a Chancery suit was settled; that on this

occasion defendant said he would place the money in a bank and leave it there till the suit was settled, and from that time forward would pay the rent to him if he was the proper person to receive it, the rent being £9 for the first year, £10 for the second year, and for the following years £12 10; and that David or Joseph Thompson put defendant into possession of this land.

The witness who detailed these circumstances understood the rent spoken of as due under a written lease. He stated that the amount of rent was mentioned at the time, and it was payable under a lease which defendant's wife had in her hands at the time of the conversation. He was shewn a lease, but he could not say whether it was the one she had or not, nor could he say whether or not it was executed by Joseph Thompson; but the lease seemed in the writing of David Thompson.

Another witness, a son of the plaintiff, was present at a conversation between the plaintiff and defendant in January or February, 1866. Plaintiff asked defendant for the rent of the fifty acres. Defendant said he had not the rent, but would pay part of it when he had it. Defendant said he had put the first year's rent into the Bank, but when his place was burnt he took it out again. On the 1st of March plaintiff again asked the rent from defendant, who said, "I would pay part of it if I had it." Defendant did not offer any particular sum of rent. This witness said the plaintiff never acted, to his knowledge, as if he were the owner of the land.

Mr. Weller, the plaintiff's solicitor in Chancery, said the plaintiff repudiated his trusteeship under the deed, and that he had burnt it for the purpose of doing away with it.

Mr. Burnham said he was the subscribing witness to the deed, the memorial of which was produced, executed by Vanstine, the grantor, and in which the deed was set forth. It was dated 30th October, 1848, and was a conveyance of this land to plaintiff, as trustee, for the use of Vanstine and his wife, if they lived together: if they separated and lived

apart, to her use for life, with remainder to their' children in fee.

The plaintiff put in a decree, dated 28th February, 1862, in a suit in Chancery, wherein Theresa Vanstine was plaintiff, and the now plaintiff was defendant, declaring that the now plaintiff under the deed just mentioned was trustee for Theresa of the land mentioned therein. Another decree on further directions, dated 2nd February, 1864, was also put in, in the same suit, ordering the plaintiff to pay £87 10. into the Commercial Bank to the credit of the cause, according to the report of the Master. This report was not produced, but it was suggested that the now plaintiff was chargeable with this sum for rents, which he ought to have received as trustee of Theresa.

Joseph Reid said the defendant occupied the land for seven years, up to 1865 inclusive. This witness then rented it at \$45 a year.

It was shown that Vanstine and his wife died ten years ago. They had two daughters, one of whom died in infancy. This Theresa was the other, and she was at the time of the trial about sixteen or seventeen years old.

On this evidence it was submitted that the plaintiff ought to be nonsuited; for there was no evidence of use and occupation, the evidence being of a holding under a lease in writing, which was not produced; that there was no evidence of privity between plaintiff and defendant; that the proof was a conditional promise, if the plaintiff was the proper person to receive the rent, and it did not appear he was.

The learned Judge overruled the objections, giving leave to move for a nonsuit.

For the defence, defendant put in and proved a lease, dated 1st March, 1859, from Joseph Thompson to defendant, of this land for seven years, or until *the child* came of age, at a rent of £9 for the first year, £10 for the second year, and £12 10 a-year for the residue of the term. It was also proved that defendant entered and held under this

lease, but no rent was in fact paid to any one ; that there were different claimants, and for the last two years the defendant's occupation was nominal rather than beneficial.

The learned Judge charged the jury to enquire whether the lease from Joseph Thompson, under which the defendant alleged he held the premises, was executed as contended ; that if so, and the defendant went into occupation under it, and that the conversations spoken of by plaintiff's witnesses, when defendant said he would pay the rent if the plaintiff was the person entitled to receive it, were referable to this lease, to find for defendant ; but if they were of opinion the lease was not executed as alleged, then there was evidence of a promise to pay plaintiff for the use of the premises, and they were to say how much they would allow.

It was objected on behalf of the plaintiff that the jury should have been told the lease created no term ; that the promise in July, 1861, by the defendant to pay rent created a demise, and the subsequent promises in January last were sufficient to maintain the action.

For the defendant, it was submitted that the jury should have been told that the lease, being in existence, the defendant was entitled to a verdict ; that the plaintiff did not prove any binding contract or attornment ; that there was no evidence that defendant acknowledged plaintiff as his landlord, and plaintiff made no claim to the land.

The jury found for plaintiff, and \$250 damages.

In Michaelmas term last, *J. D. Armour* obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, on the ground that the lease referred to in the evidence of Christopher Thompson was not produced by the plaintiff : that the evidence did not support this action : that the defendant having entered under a stranger the premises made did not support the action, and at all events were only conditional. Or, why a new trial should not be had between the parties, on the grounds that the learned Judge, who tried the cause, admitted secondary evidence of the trust deed from Vanstine to the plaintiff, without a proper foundation having been laid

therefor; and on the ground of misdirection in the learned Judge, in telling the jury that even if they found that defendant held under the lease produced, yet, if defendant absolutely promised to pay the rent to plaintiff, they should find for plaintiff; and in not telling them that if they found that defendant held under said lease, the evidence did not establish the relationship of landlord and tenant, or any contract between plaintiff and defendant, and they ought to find for defendant; and on the ground that the verdict was contrary to law and evidence in this, that it clearly appeared that the defendant entered and held under Joseph Thompson under said lease, and the evidence did not establish the relationship of landlord and tenant, or any contract between plaintiff and defendants to support this action.

H. Cameron shewed cause, and cited *Churchward v. Ford*, 2 H. & N. 446; *Cripps v. Blank*, 9 D. & R., 480; *Hillier v. Sillcox*, 19 L. J., Q. B. 295.

Armour, contra, cited *Lawless v. Queale*, 8 Ir. Law Rep. 382; *Marston v. Dean*, 7 C. & P. 13; *Rex v. The Inhabitants of Merthy Tydvil*, 1 B. & Ad. 29; *Augustien v. Challis et al.*, 1 Exch. 279; *Tay. Ev.*, 4th Ed. 392, 430; *Knight v. Cox*, 18 C. B. 645; 11 Geo. 2 c. 19, s. 11; *Delany v. Fox*, 2 C. B. N. S. 768; *In re Emery and Barnett*, 4 C. B. N. S. 423; *Woodfall, L. & T.*, 8th Ed. 864.

J. WILSON, J., delivered the judgment of the Court.

Before the Stat. 11 Geo. 2, actions of *assumpsit*, for the use and occupation of land, had frequently been held maintainable, notwithstanding the objection that rent sounded in the realty, and could not be the subject of a mere personal action, the courts apparently treating the contracts between the parties as agreements and not leases, and so not concerning the realty, wherever they held the actions maintainable, and holding the action not maintainable wherever they could not shut their eyes to an actual lease, as in the case of *Brett v. Read*, (Cro. Car. 343), which was *indebitatus assumpsit* for rent arrear, and was held bad on that account. The principal cases are collected

in the note to *Beverley v. The Lincoln Gas Light and Coke Company* (6 A. & El. 839, note a). The Court in that case observed that "the action for use and occupation is established by Stat. 11, Geo. 2, ch. 19, s. 14, which expression must not be taken as meaning that it was introduced by that act, but only that it was established even in cases where there was an express demise at a certain rent, if not under seal. Yet no instances of *indebitatus assumpsit* for use and occupation will be found before that act, nor any founded upon a *quantum meruit*: they are all for some fixed sum."

This statute enacts that it shall be lawful for the landlord, when the agreement is not by deed, to recover a reasonable satisfaction for the lands occupied by the defendant for the use and occupation of what was so held or enjoyed; and if, in evidence on the trial of such action, any parol demise or agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered.

"Before this statute, the landlord's remedy by action for his rent must have been upon the demise, and he could only recover accordingly:" per Holroyd J., in *Hall v. Burgess* (5 B. & C. 333). Bayley, J., said that "a landlord suing for rent must proceed either upon an express contract made with his tenant, or upon a contract which the law will imply from the relation subsisting between them." (See *Gibson v. Kirk*, 1 Ad. & E. 855.)

* Here the plaintiff did not hold himself out as landlord of the defendant, or do anything to indicate that he claimed the land, nor does it appear that the defendant held or occupied under the plaintiff, nor can we imply a contract from any relation subsisting between them. The evidence is, that Joseph Vanstine, in October, 1848, conveyed this land to the plaintiff as a trustee, but the trusts in the deed were repudiated and the deed destroyed, in the ignorant belief that it would put an end to the trust. The plaintiff asserted no title to the land, nor did he do anything until February, 1861, when the bill was filed, or threatened to be filed, upon

which the decrees were made, charging him as trustee of the infant of Vanstine, and praying to have him declared liable to her for the profits of the land. Then he went to the defendant and forbade him from paying rent to any one until a Chancery suit was settled. During the conversation Mrs. Bennett had a lease in her hand, under which the rent spoken of was payable, and under which the defendant held the land. The defendant answered, "I will place the money in the Bank and let it stay there until the suit is settled, and from that time forward I will pay the rent to you, if you are the proper person to receive it." Nothing further is shown until January or February last, when the plaintiff asked the defendant for rent. The defendant replied, "I have it not, but I will pay part of it when I have it." This was followed up on the 1st of March by the plaintiff asking defendant for rent, and his replying, "I would pay part of it if I had it."

It appears to us that this rent spoken of was the rent payable under the lease; not as rent for the occupation under the plaintiff, for it nowhere appears that the plaintiff ever asserted his right to the land as landlord.

The evidence, we think, points to the defendant's willingness to attorn or become the tenant of him who was entitled to the land, not to the fact that he was occupying under the plaintiff, and that the promise was to pay the rent reserved under the lease referred to at the first conversation, and was not therefore evidence to shew an occupation under the plaintiff, but an assertion of holding by deed, which by the statute precludes this form of action.

If the plaintiff had at that time asserted title in himself, or had claimed the land, what was said might, perhaps, have been evidence of an attornment; but if the defendant had attorned to the plaintiff this action could not have been maintained. This, however, is not the question here. We think the evidence does not sustain the action for use and occupation, and therefore the rule will be absolute for a nonsuit.

Rule absolute for nonsuit.

TAYLOR (SHERIFF) V. BROWN.

Absconding Debtors Act (C. S. U. C. ch. 25)—Action by Sheriff—Attachment—Conversion by co-partner of joint property—20 Geo. II., ch. 37—Pleading.

Held, on exceptions to the first count of the declaration set out below, which was by a Sheriff under the 25th section of the Absconding Debtors' Act (C. S. U. C. ch. 25) against the defendant, a partner of the absconding debtor, for converting the joint property, that the count was bad; first, because it did not state that the plaintiff sued under the provisions of that act as required by the 26th section thereof, though it did state that he had, in compliance with the 25th section, obtained the order of a Judge to bring the action; and, secondly, because it was not shewn that notice of the attachment had been served upon defendant, or that the goods had been attached or seized by the former Sheriff, during whose tenure of office the attachment had issued, or by the plaintiff, his successor in office, the averment being merely that defendant, having property in his possession (which the Sheriff might have seized, but did not seize, whilst the property was liable to seizure), converted it to his own use.

Semble, that the fact of the defendant, if sued, being limited under the statute in his defence to matters that would avail him against the absconding debtor at the date of the writ of attachment, refers to the prosecution of claims arising before the issue of the writ. But *Held*, that the count was not objectionable for not stating that the attaching creditor had proved his debt before judgment, or filed an affidavit of the sum justly due before the issue of execution, for that the 9th section of the act expressly directed that this should be done, and the maxim *omnia rite esse acta*, &c., must be applied to proceedings in the Superior Courts.

Held, also, that it was not necessary to allege that the real and personal property, &c., attached, had proved insufficient to satisfy the execution, or what return the Sheriff had made to the writ, as it appearing that the suit had been brought by order of a Judge, it must be presumed that he was satisfied, as he must have been under the statute, as to the insufficiency of the goods, or he would not have granted the order.

Semble, that inasmuch as under the law, as now settled, there may be a conversion by one co-partner of the joint property, it was not necessary to allege more than the fact of conversion, leaving it to be shewn by the evidence that there was such a destruction of the joint property as would make it between persons so situated a conversion.

Held, also, that it must be assumed, if there was any Sheriff having the execution of the writ in this cause, it was the plaintiff, who had been authorized by the order of a Judge under the statute to bring this action, the statute contemplating that the Sheriff for the time being shall sue for demands and rights of action attachable under it; and the 20th Geo. II., ch. 37, providing that outgoing Sheriffs shall turn over to their successors all such writs as shall remain in their hands unexecuted, who shall duly execute and return the same.

The plaintiff having demurred merely to the plea to the first count of the declaration, *Held*, that defendant could not except to the declaration on the ground of misjoinder of counts, as that objection could only arise on demurrer to the whole declaration.

THE declaration, which was by the plaintiff, as Sheriff of the County of Hastings, stated that one William Baker in 1861, issued a writ of attachment against John S. Baker, as

an absconding debtor, and delivered it to the Sheriff of the County of Hastings, and having recovered judgment issued a *fi. fa.* against the goods of said Baker, and gave the same to the then Sheriff; that at the time of the delivery of said attachment, said Baker and defendant had in said Sheriff's bailiwick goods and chattels liable to attachment under said writ, and that defendant took and carried away a large portion thereof to the value of \$2000, and converted the same to his own use; that the said J. S. Baker had absconded prior to the issuing of the writ of attachment, and was then an absconding debtor; that the then Sheriff, after the expiry of said attachment and said *fi. fa.*, ceased to be Sheriff, and plaintiff succeeded him as such, and was such at the commencement of this suit; that said William Baker was the only one who had obtained judgment against J. S. Baker; that the *fi. fa.* was returned by plaintiff, and an *alias* issued, and was then in force; that an order was made on the 12th of February, 1866, allowing plaintiff to sue in this cause.

Defendant pleaded, amongst other pleas, that plaintiff never had any writ of attachment at the suit of William Baker, nor did he attach under such writ any goods of J. S. Baker.

To this plea plaintiff demurred, and defendant thereupon gave notice of exception to the declaration, on the following grounds:

1. That it was shewn by said first count that plaintiff sued as Sheriff of the County of Hastings, and brought this action under the provisions of "An Act respecting absconding debtors," but there was no introductory averment as required and directed by the 26th section of said act.

2. Said first count did not aver that said William Baker in said attachment proved the amount of debt or damages claimed by him before obtaining said judgment, or that before issuing said *fi. fa.* plaintiff in the said attachment, his attorney or agent, made and filed an affidavit of the sum justly due by the absconding debtor, as provided by the 9th section of said act.

3. Said first count did not aver that notice in writing of the said attachment had been by the then Sheriff, or by or on behalf of plaintiff in said attachment, or by any other person, duly served upon defendant in this action, or that the then Sheriff or plaintiff seized any property and effects under said attachment, or *fi. fa.*, or *alias fi. fa.*, and that the same were insufficient to satisfy said judgment.

4. Said first count did not allege that the real and personal property of said absconding debtor, attached by said attachment, had proved insufficient to satisfy said executions, nor did it allege what return plaintiff had made to said *fi. fa.*

5. Said first count did not allege the property sued for was, or ever had been, owing to or recoverable by said absconding debtor, as provided by said act, as well as by the Judge's order mentiond in said first count.

6. In said first count plaintiff claimed to recover in his official capacity as Sheriff under the provisions of the above named act, and in the same declaration he claimed for causes of action in his private capacity as a creditor of defendant, and therefore there was a misjoinder of counts and causes of action in the declaration.

7. Said first count did not disclose any cause of action in plaintiff.

R. P. Jellett, for the demurrer, referred to Con. Statz. U. C., ch. 25, secs. 9, 23, 26.

Holden, contra, cited 27 & 28 Vic., ch. 28, secs. 1, 49.

RICHARDS, C. J., delivered the judgment of the Court.

If the first ground of objection to the declaration be properly taken, it is probable it would not be held to prevail. If it clearly appeared that the Sheriff was bringing the action under the 25th sec. of 22 Vic. cap. 25, it would, I think, be deemed sufficient, under the authority of *Ferguson et al v. Mitchell* (1 Ty. & G. 179). It was there held to be sufficient if assignees of a bankrupt or insolvent declare so as to make it appear that they are assignees: "it is not necessary to allege that they sue as assignees."

Here, the statute gives power to the Sheriff to sue under the authority of the act, under certain circumstances, but requires that in the declaration the averment shall be made that he "sues under the provisions of the law respecting absconding debtors, in order to recover from the debtor of the absconding debtor the debt due by such debtor to the absconding debtor."

If the Sheriff, like the official assignee of an insolvent, or the assignees of a bankrupt, was by law bound to collect the debts due the bankrupt, and could sue for the same in his own name, by virtue of his position, then it might not be necessary to allege that he sued as such. But here the Sheriff does not, *primâ facie*, as Sheriff, or by virtue of his office, have the right to sue to recover debts, &c., due to the absconding debtor. Under certain circumstances, and by leave of a Judge, he may sue, and the statute declares that he must state in his declaration that he does it under the authority of the act, in order to recover the particular debt.

He shews in the declaration, subject to the points hereafter to be discussed, that he was authorized to bring an action under the statute, but does not aver in his declaration that he does sue under it. It seems to me that this 26th section of the statute is not simply directory, but was intended to compel the Sheriff to shew on the face of the declaration the very authority under which he was suing, so that by the record it might appear unmistakeably how and by what right the proceeding was had, and this as well for the protection of the defendant in that action, in case of a recovery barring the right of the absconding debtor, as of the debtor himself and the creditors of the estate; that the proceeding was one, in fact, arising out of the attachment and instituted strictly under the act, so that all parties would at once have their rights apparent on the face of the record.

As to the second objection—That it is not shewn that the attaching creditor proved his debt before obtaining judgment, or that he filed an affidavit of the sum justly due before issuing the execution—we must assume this was done; for

the 9th section of the statute expressly directs that the debt shall be proven before the plaintiff obtains judgment, and that no execution shall issue unless the plaintiff, his attorney or agent, has made and filed an affidavit of the sum justly due. I think we must apply the maxim of *omnia rite esse acta præsumentur* to proceedings in our own Superior Courts.

The third objection—There is no averment of notice of the writ of attachment being served on the defendant by any one, or that the late or present Sheriff seized any property or effects under the writ of attachment, or *fi. fa.*, or alias *fi. fa.*, and that the same are insufficient to satisfy the said judgment.

The 23rd section of the act provides, in case a notice in writing has been duly served upon any person owing any debt or demand to, or who has the custody or possession of any property or effects of, any absconding debtor, and in case any person after such notice pays any such debt or demand, or delivers any such property or effects, to the absconding debtor, or to any person for the individual use and benefit of such debtor, he shall be deemed to have done so fraudulently, and if the plaintiff recovers judgment against the absconding debtor, and the property and effects seized by the Sheriff are insufficient to satisfy such judgment, such person shall be liable for the amount of such debt or demand and for such property and effects, or the value thereof.

Under the 14th section of the statute, all the property, credits and effects of the debtor might be attached in the same manner as they might have been seized under execution, and the Sheriff was to take into his charge or keeping all such property and effects. Then, the Sheriff is to sell perishable property, &c.

The declaration alleges that, at the time of the delivery of the writ of attachment to the Sheriff, the defendant and the absconding debtor had within the Sheriff's bailiwick a merchant's stock-in-trade *liable to attachment under the said writ*, and afterwards and during the currency of the attachment defendant took and carried away a portion thereof,

to the value of \$2,000, and converted the same to his own use.

The goods are alleged to have been liable to have been attached under the writ. It is not stated that they were attached: they are not claimed to be liable to be now seized, or that defendant is liable on the ground that they were seized. It is not alleged that any notice of the writ of attachment was served on the defendant, so that he would be liable for the *property or effects*, or the value thereof, as property or effects which belonged to the absconding debtor; but the claim is that defendant, having property in his possession which the Sheriff might have seized, but did not, whilst the property was liable to seizure, converted it to his own use. Under such circumstances, no doubt, the absconding debtor, if not restrained by the effect of the attachment law, would, under ordinary circumstances, have a right of action for the tort, but that right would have accrued after the issuing of the attachment. It is true, the property out of which it arose was liable to be attached in the same manner as it might have been liable to be seized under an execution; but if a Sheriff during the currency of his writ does not seize property liable to be seized, the owner may sell it, and the property sold passes. If the execution expires the property thus becomes the property of the purchaser free from the claim of the execution creditor, or of the defendant in the action. Suppose this property had been brought into the County of Hastings by the absconding debtor a week before this action had been commenced, and delivered by him to this defendant, who had converted it to his own use, could the present action be maintained for such a conversion? I should say not.

The first section of the statute says, if any person, resident in Upper Canada, indebted, &c., departs from Upper Canada, with intent to defraud his creditors, and at the time of his so departing is possessed to his own use and benefit of any real or personal property, credits or effects, then he shall be deemed an absconding debtor, and his property, credits and effects aforesaid *may be seized and taken* for the

satisfaction of his debts by a writ of attachment. Suppose they are not seized or taken, can they be sued for? It seems to me, as no notice was given to the defendant under the act at all, he cannot now be sued in this action, and the third objection is fatal. The fact that the defendant, if sued under the statute, is limited in his defence to matters that would avail him against the absconding debtor at the date of the writ of attachment, I think, refers to prosecuting claims that arose before the issuing of that writ.

The fourth objection is, That it is not alleged that the real and personal property, &c., attached by the writ of attachment, have proved insufficient to satisfy the execution obtained in the suit, nor is it alleged what return the plaintiff made to the writ. As it appears by the declaration that this suit is brought by order of the Judge, I think, we must presume that he was satisfied that the personal property and effects attached were insufficient to satisfy the execution obtained against the absconding debtor, or he would not have granted the order. The establishing of the fact seems necessary before the granting of the rule or order by the Judge, and the order having been granted, that is all that seems necessary to bring the case within the statute, as long as the order remains.

The fifth ground seems covered by the observations on the third ground.

The sixth ground is not open, for the demurrer is only to the plea to the first count, and the objection as to misjoinder of counts can only arise on a demurrer to the whole declaration. The error, however appears on the record, and it had better be amended by the plaintiff.

The seventh ground, that the declaration does not disclose any cause of action in the plaintiff, is about as broad as the demurrer itself. It may be covered by the observations as to the third ground, or it may refer to the fact that the supposed cause of action arises from an alleged conversion of joint property by one of two co-partners or joint tenants. As the late cases shew that their may be a conversion by one co-partner of a joint

property of the co-partnership, it is probably not necessary to allege in the declaration more than the fact of conversion, leaving it to be shewn by the evidence that there was such a destruction of the joint property as would make it, between persons so situated, a conversion; as to which see *McNabb v. Howland et al* (11 C. P. 434) and the cases therein referred to.

We think the statute contemplates that the Sheriff for the time being shall sue for demands and rights of action attachable under it; and, inasmuch as by the statute of 20 Geo. II., ch. 37, an outgoing Sheriff shall turn over to the succeeding Sheriff all such writs as shall remain in his hands unexecuted, who shall duly execute and return the same, we must assume, if there is any Sheriff having the execution of the writ in this cause, it is the present plaintiff, who was authorized by the order of the Judge, under the statute, to bring this action.

As to the plea demurred to, as the declaration is bad, it is a matter of little consequence, but I believe it was not attempted to be supported.

*Judgment for defendant on exceptions to
first count of declaration.*

FISHER V. HOLDEN.

Entering appearance without authority—Omission of allegation of malice and reasonable or probable cause—Costs—Pleading.

Plaintiff declared against defendant for having caused an appearance to be entered for the defendants in an action of ejectment brought by plaintiff against them, to recover possession of certain land assigned to plaintiff under process issued in an action of dower against this defendant, alleging that he had done so wilfully, wrongfully, and without the consent, knowledge or authority of the defendants, but not charging *malice and want of reasonable or probable cause*:

Held, on demurrer, that the declaration was bad on this ground.

Semble, that defendant and his attorney would, on such a declaration, be liable to the defendants in the ejectment suit; and that (the defendants therein being worthless) he would also be liable to the plaintiff for the costs of that suit, on a summary application to the Court made therein.

DECLARATION, that plaintiff became entitled to the possession of certain lands in Belleville in an action of dower against defendant; that the occupants thereof having refused to give up possession, and plaintiff having issued a writ of ejectment against and served each of them therewith, defendant wilfully, wrongfully, &c., and without the consent or knowledge or authority of said occupants caused an appearance to be entered for them in such actions, whereby plaintiff was put upon her title therein, and verdicts having been found against her, the Court, upon motion, ordered the same to be entered in her favor, and plaintiff having entered judgment on such verdicts and issued executions for her costs of suit, the said executions were returned *nulla bona*, the said defendants being worthless, and plaintiff was by the defendant's wrongful acts kept out of possession of said land for a long time, and put to large costs, &c., &c.

Demurrer.—1st. That it appeared upon the face of the declaration that for the alleged act of the defendant complained of therein the plaintiff was not the person entitled to sue, but that the cause of action, if any, was in the said occupants of the land therein mentioned.

2nd. That the declaration should have alleged that the acts complained of were done maliciously.

Holden, for the demurrer, cited *Bayley v. Buckland*, 1 Ex. 1; *Henderson v. McMahon*, 12 U. C. 288; *Young v.*

Daniell, 21 U. C. 443; *Massey v. Rapelge*, 5 C. P. 134; *Stanhope v. Firmin*, 3 B. N. C. 301.

R. P. Jellett, contra, cited *Moran v. Schermerhorn*, 2 Pr. Rs. 261; *Levi v. Langridge*, 2 M. & W. 519, 4 M. & W. 337; *Green v. Button*, 2 C. M. & R. 707; *Dyceir v. Battue*, 3 B. & Al. 448; *Jones v. Doe*, Barn. 178; *Turner v. McGee*, 9 Dowl. 112; *Collins v. Evans*, 5 Q. B. 804; *Gehard v. Bates*, 2 E. & B. 476; *Randell v. Trimen*, 18 C. B. 786.

RICHARDS, C. J., delivered the judgment of the Court.

I have looked at all the cases referred to and have not been able to find one in which an action like the present has been maintained, or even brought. The cases referred to shew that when a person unlawfully and maliciously, and without reasonable or probable cause, brings an action in the name of a third person, the party injured may maintain a suit against the person thus proceeding, and there are numerous cases shewing that when the parties really interested in defending an ejectment suit have put forward a pauper or man of straw to defend the suit, the Court will, on application in a summary way, make the parties really interested pay the costs.

In *Cotterell v. Jones* (11 C. B. 713) there is an elaborate argument on the question how far a person, who induces another to take legal proceedings against a third party, may be liable in an action by the person injured in consequence of such proceedings, and *Williams, J.*, in that case said: "It is clear no action will lie for improperly putting the process of the law in motion in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable or probable cause."

On the argument, the learned counsel for the plaintiff urged that the novelty of the action was no ground for our assuming that it could not be maintained, and we were referred to the argument in *Langridge v. Levi* (2 M. & W. 519), where an action novel in its character was maintained, and reference was made to the observations of *Wilmot, C. J.*:

"It is said this action was never brought, and so it was said in *Ashby v. White*. I wish never to hear this objection again. This action is for a tort. Torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief."

The observations of *Creswell, J.*, (in *Revis v. Smith*, 18 C. B. 141), frequently suggest themselves when novel actions are brought: "The world has gone on very well without such actions as these, and I doubt whether it would continue to do so if such things were allowed."

The ground, upon which an action can be maintained, when a person unlawfully, maliciously and without reasonable or probable cause puts the process of the Court in motion in the name of a third person to the prejudice of the defendant in such action is intelligible, and such an action can only be sustained when the defendant in the original suit has sustained damage by such malicious proceeding.

It is true that in some of the cases referred to, where it did not seem that the defendants acted maliciously, they were held liable to the parties injured, who in good faith relying on their representations suffered injury from something done by them in consequence of the conduct or representations of the defendants. In *Randell v. Trimmen* (18 C. B. 786), where the defendant represented he was authorized to order stone on behalf of a third party, and he had not such authority, the plaintiff having acted on the faith of defendant's representation, it was held he could recover from defendant; and in *Gehard v. Bates* (2 E. & B. 476), where defendant falsely and to deceive the public made certain representations as to shares of an incorporated company, and plaintiff relying on the faith of such representations, purchased shares and suffered loss, plaintiff was there properly held entitled to recover.

But in *Evans v. Collins* (5 Q. B. 804, 820), where an attorney's clerk informed the Sheriff that a person in custody was the same against whom a detainer had been lodged by the attorney, and the Sheriff relying on that information detained the person in custody, and it turned out that he

was not the defendant who was named in the detainer, the Sheriff, in an action against the attorney, was held in the Court of Queen's Bench to be entitled to recover damages for the amount he paid the prisoner whom he had illegally detained; but in the Exchequer Chamber the judgment of the Court of Queen's Bench was reversed, on the ground that though the statement made was false in fact, it was not fraudulently made knowing it to be false.

The general doctrine with regard to false representations is that laid down by *Tindal*, C. J., in 7 Bing. 107: "The confusion seems to have arisen from not distinguishing what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false and injury ensues: although the motives from which the representations proceeded may not have been bad, the person who makes such representations is responsible for the consequences."

In *Evans v. Rees* (1 Dowl. N. S. 338), an action of trespass between two tenants, who were merely nominal parties, after verdict an application was made to compel the landlord of the plaintiff against whom the verdict was found to pay the costs, as being the party really interested in the suit: it was held the Court had no power to interfere. In ejectment the Court could interfere, but in all other cases the defendant, if desirous of obtaining costs from a person not a party to the record, should apply for security for costs.

In *Hayward v. Giffard* (6 Dowl. 699), the plaintiff was a pauper and had absconded after judgment of *non pros*. It was attempted to make Spence, who was the real plaintiff, responsible for the costs, but the Court refused to make the rule, saying they had no power over a person not a party to the suit except in ejectment.

Doe dem Masters v. Gray (10 B. & C. 615), in ejectment the Court compelled the real defendant to pay the costs. In *Thuslant v. Shenton* (Ib. 110) the same principle was advanced.

In *Berkeley v. Dimery et al* (10 B. & C. 113) an application was made to compel one Hall, by whose directions

the trespass was committed, to pay the damages and costs. It was urged the plaintiff might not have known at the time he commenced the action that Hall was the responsible trespasser. Lord Tentenden said: "The tenant in ejectment must be sued and the Court will not permit a person to put a mere pauper into possession to evade costs. Here, Hall might have been sued as a trespasser either jointly or singly. It is said the plaintiff did not know that Hall was the substantial defendant. Parties should take care before and when they sue to ascertain who is the substantial defendant. If the Court were to grant this rule, the application to subject to costs persons who were not parties to the record would be very frequent."

In *Doe Wright v. Smith* (8 Dowl. Prac. Ca. p. 517) the head line is: "When in an action of ejectment an insolvent defendant had been induced to defend the action by a third person (named Proud), who employed the attorney and furnished money to carry on the defence, but who claimed no interest in the property sought to be recovered, the Court would not compel the latter to pay the costs of the lessor of the plaintiff." In shewing cause the counsel for Proud said, "It might be possible that an indictment for maintenance could be preferred against Proud, but the present application would not succeed."

The law on the subject is shortly summed up in *Addison on Torts* (2 Ed. at p. 530), as follows: "No action lies for improperly promoting a civil action in the name of a third person, unless it was alleged and proved to have been done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause the action will lie, provided there be also legal damage."

In the declaration it is not charged that the defendant did the acts complained of maliciously, and without reasonable cause for believing he had the right to do so; and if the appearance was entered by the defendant in the names of Johnson and James for the purpose of enabling himself to defend the suit (they being persons not worth anything) without the risk of costs to himself, though this action will

not lie, yet he would be liable to pay the plaintiff's cost of suit on a summary application to the Court. *Mobbs v. Vardenbank* (4 Best & Smith 204) is a very late case, shewing that when a plaintiff, even in ejectment, puts forward a man of straw to maintain his action, he will be liable to pay the costs of the opposite party. There are many cases referred to to shew that the rule has been long acted on in relation to defendants: the case in Best and Smith establishes that the doctrine applies equally to plaintiffs, and prevails in the changed form of the action.

From all that appears in this declaration this defendant may have believed he had authority from Johnson and James, the defendants in the ejectment suit, to enter the defence for them. If so, how could the action be sustained in its present form?

The allegations of having wrongfully, unlawfully and unjustly defended the ejectment suit are not equivalent to saying that it was done *maliciously*. *Saxon v. Castle* (6 A. & E. 652), and *Porter v. Wiston* (5 Bing. N. C. 715), seem to be authorities to shew that in cases similar to this notice must be expressly alleged and proved.

Findon v. Parker (11 M. & W. 675) is an authority to shew that when parties supposed they had a common interest in the subject matter of the litigation, and agreed to maintain each other, that did not constitute legal maintenance.

The allegations in the declaration do not shew that the defendant was *maintaining* Johnson and James in their defence of plaintiff's rightful suit, but rather that without their knowledge or authority he was himself defending the suit in their names. The defendant and his attorney may be answerable to Johnson and James for doing this, but I do not think that we can properly hold that he is liable to the plaintiff in this action for doing so, though he may probably be liable to pay the costs of defence on an application to the Court in the original suit, if the facts bring the defendant within the rule referred to in the case above quoted.

Judgment for defendant on demurrer.

MUCKLESTON V. SMITH.

*Lease of lands—Mem. attached to lease—Contemporaneous delivery of chattels
—Seizure of lessee's interest—Interpleader.*

Where A. demised to B. for a term of years, with a clause of forfeiture in case the term should be taken in execution, and contemporaneously with the lease delivered certain chattels into B.'s possession, upon the terms contained in a memorandum attached to the lease of the premises, signed by M., stating that "he agreed to allow the use of the chattels to assist him to pay the rent and maintain his family," on an interpleader between A. and C., who had seized the chattels under an execution against B., *Held*, affirming the judgment of the county court, 1st, that the memorandum formed no part of the lease, but operated only as a license to use, which was revocable.

2nd. That even if the chattels had been included in the lease, the chattels themselves could not have been sold, and that A. therefore was entitled to a verdict in the interpleader issue.

3rd. That at the most the interest which B. had in the chattels was incidental to the term and to the enjoyment thereof by B., and that therefore neither the goods themselves nor B.'s interest therein could be sold separately from the term.

4th. That if the term had been seized, such seizure, as working a forfeiture of the term, would have operated also as a forfeiture of all B.'s interest in the chattels; and therefore, *Held*, that upon all the grounds the verdict in favor of A. was right.

5th. That if it had been intended that only the defendants' special interest in the goods should be sold by the Sheriff under an execution, not the goods themselves, the interpleader should have been framed to meet such a case.

Appeal from the County Court of the County of Frontenac.

This was an interpleader issue to try the right of the respondent (plaintiff in the Court below) as against the appellants (defendants in the Court below) to certain goods seized by the Sheriff under an execution issued by the appellants against one Stanton.

It appeared that the goods in question had been previously sold by the Sheriff to respondent, under an execution issued by him against said Stanton, and in order to assist the latter had been left by respondent with him, under the following memorandum, attached to a lease of the premises, which Stanton held from him: "I hereby agree to allow Mr. Nicholas Stanton the use of all the property I purchased at Sheriff's sale, to assist him to pay the rent and maintain his family."

It was objected, on behalf of the appellants, that respon-

dent could not recover, 1st, because he had not such an interest as entitled him to resist the seizure when it was made; 2nd, that the lease and memorandum attached formed but one instrument in law; 3rd, that there was a saleable interest in the goods; 4th, that there had been no forfeiture worked, and in fact no evidence of the term having been seized.

Leave was reserved to the appellants to move to enter a verdict for them on these grounds.

The jury found for respondent.

In the following County Court term, the appellants obtained a rule *nisi* on the leave reserved, and also for a new trial, on grounds not necessary to mention, which rule was, after argument, discharged by the learned Judge of that Court.

The appellants thereupon appealed from this judgment, stating the same objections as grounds of appeal as those taken at the trial in the Court below, with the additional ground, that the learned Judge admitted oral evidence to contradict a sworn affidavit of the plaintiff.

Sir Henry Smith, Q. C., for the appeal, cited *Stegman v. Fraser*, 6 Grant, 628; *Co. Litt.* 45 b.; *Bac. Ab.* "Leases," K.; *Right v. Proctor*, 4 Burr. 2208; *Add. Cont.* ch. 6, p. 335; *Penero v. Judson*, 6 Bing. 206; *Doe v. Powell*, 7 M. & G., 980, 988, 992; *Woodfall*, L. & T., 8 Ed. 71; *Tay. Ev.* 631, 632; *Greenl. Ev.* 210.

J. Gwynne, Q. C., contra, cited *Ward v. Macauley*, 4 T. R. 489; *Gordon v. Harper*, 7 T. R. 9; *Tancred v. Allgood*, 4 H. & N. 438, and 444 *per* Pollock, C. B.; *Arch. Pr.* 11 Ed. 606; *Lancashire Co. v. Fitzhugh*, 6 H. & N. 502; *Green v. Rogers*, 2 C. & K. 148; *Shephard v. Corbett*, 4 C. P. 53, 59, 68; *Heane v. Rogers*, 9 B. & C. 656; *Tayl. Ev.* 742; *Fenn v. Bittleston*, 7 Ex. 152.

RICHARDS, C. J., delivered the judgment of the Court.

The memorandum attached to the lease is not referred to in it, nor is the lease itself further referred to by the memo-

random than by the statement that the plaintiff agreed to allow Mr. Nicholas Stanton (who was the tenant named in the lease) the use of the chattels, to assist him to pay the rent and maintain his family. The instrument not being under seal, and no consideration being named or shewn for the agreement, it seems to be *nudum pactum*, and the plaintiff is not bound thereby. *Smith v. Plomer* shews that in a similar case an action would lie by the lessor if it had been a lease.

It is urged that the intention of the parties was to make the chattels a part of the property demised, and to accompany the term created by the lease, and that we ought so to hold. But, if we are to infer that such was the intention, ought we not to conclude also (inasmuch as the lease provides if the term created by it shall at any time be seized or taken in execution by any creditor of the lessee, the term shall become forfeited and void) that it was equally the intent of the parties that the property which was to accompany the term should revert to the owner, as well as that the leased premises should do so in the event of its being seized? Take the case of a lease of real and personal property for four years, with one *reddendum* of rent, and a proviso if the term were seized under a *fi. fa.* it should be forfeited; then, suppose both the term and the personal property were seized after one year, could the creditor under his execution sell the interest of the lessee for the remaining three years in the goods, though the term as to the realty was forfeited, and would the owner of the personal property not be in a position to recover damages for the injury and loss he would suffer because he had not his goods to let again with his farm? It is said, if during the term the lessee kill, destroy, sell, or give away the cattle, he will subject himself to an action of trespass: *Litt.*, s. 71; *Co. Litt.*, 57.

I am not prepared to say that the memorandum becomes a part of the lease, so as to enable the lessee to hold the chattels referred to in it against the plaintiff, in the event of his complying in other respects with the terms of the lease. It is a mere license to Stanton to use the property, which

may be revoked at any time, and does not enable him to hold it against the will of the plaintiff. If this be the effect of the instrument, there can be no doubt that an action could have been maintained against the Sheriff by the plaintiff for seizing and selling the property after being forbidden by the owner, and consequently that the interpleader proceedings were properly instituted.

But it is urged that the plaintiff stated in an affidavit on which these interpleader proceedings were taken that he had leased the farm to Stanton, together with all the goods and chattels sold by the sheriff to him, for a period of twelve years at a yearly rent of \$70, payable in advance, and that he is not allowed to contradict the statement thus made on the trial, nor to shew that in fact the transaction as far as the goods were concerned was not a lease.

Suppose the plaintiff to have been mistaken, and that the property was not really leased for the twelve years with the farm, is that any reason why he should lose it and that it should go to pay the debt of Stanton to these defendants? That debt was not contracted on the faith of that statement, nor was any liability contracted by these defendants, from the statements in the affidavit, further than entering into this interpleader proceeding. In that view it might and probably would affect the question of costs, if the Judge was satisfied that the interpleader proceedings* were entered into by them in consequence of the statement contained in that affidavit.

It does not always follow that the finding in an interpleader issue will necessarily dispose of the case before the Judge. In some cases the Judge might enlarge the time for returning the writ after an interpleader was tried, until an application could be made to a Court of Equity. In *Bird v. Crabb* (7 Jur. N. S. 866, 7 H. & N. Amer. ed., at p. 996), where in an interpleader the verdict was that the goods seized under an execution against her husband were the property of a married woman, it was held it was not necessarily a wrong verdict. *Bramwell, J.*, in giving judgment, said, "We do not mean to decide that the goods were not subject

to the execution, or that they were: we only decide that the verdict on the issue will stand as it has been found." There the issue to be tried was, whether the goods were the goods of Lydia Bird, the claimant, against Frederick Crabb, the execution creditor.

We must consider the issue ordered in the Court below to be one which, at the time it was granted, was thought the proper one to be taken for the protection of the Sheriff, otherwise it would not have been consented to or ordered in that form.

There may be instances where personal property is leased and the Sheriff may sell but the lessee's interest, and not in any way meddle with it so as to make himself liable to the reversioner, if such a term can be applied to the lessor of personal property. If under such circumstances the Sheriff should apply for an interpleader, it seems to me, the proper course for the execution creditor to take, who required the Sheriff merely to sell the interest of the lessee, would be to state that to the Court or Judge when the Sheriff applied for the order, or if he had notified the Sheriff to that effect before the application was made, the Judge would not direct an interpleader unless it was to try the right of the claimant as against the sale of the interest of the lessee.

These issues are directed for the purpose of informing the conscience of the Court, and, unless they are framed with a view of meeting the real questions likely to arise, are of little practical benefit.

Here this issue is simply the broad one, whether the property seized under the execution is the property of the plaintiff as against the defendants.

Notwithstanding the difficulty suggested in the cases, as to the position of the lessor of personal property, it has never yet, I believe, been contended that the property is not his in a certain sense. It is said he cannot bring trespass, or he cannot bring trover, because he has not the possession or the right to the immediate possession, and that some one else has such possession, or such right. But when the naked issue is presented, if he is the owner as against the party

who *may be* asserting the right to sell it absolutely and not the interest of a mere lessee, then, it seems to me, that the question, whether trespass or trover or case would lie for such a disposing of the property, does not arise on an interpleader framed as this is. In *Tancred v. Allgood* (4 H. & N. 438) the right of the lessor of personal chattels to sue for the sale during the period of the lease is discussed, and many of the authorities are there referred to, and the subsequent case of the *Lancashire Wagon Co. v. Fitzhugh* (6 H. & N. 502) shews that under certain circumstances a Sheriff may be liable to the lessor of goods when sold under an execution against the lessee.

In *Tancred v. Allgood*, Pollock, C. B., says, "When goods are let with a house, the Sheriff cannot sell them to be used elsewhere."

In taking up the grounds of appeal—as to the second ground—I am not prepared to say that the lease and paper attached form but one instrument in law, so as to make the chattels therein referred to pass to the lessee for the term of the lease. But if it did, the reasonable view seems to be that you could not separate them from the term in the lease and sell the supposed interest in them apart from the lease. If they could only be used on the place in connection with the lease they would be of little value to the purchaser, and if they were taken from the lessee it would not enable him to have their use to aid him in paying the rent, or to support his family, which would clearly be contrary to the intent of the parties.

Thirdly.—If there is no lease of the chattels, there is no saleable interest in them; but if there was such an interest, I am not prepared to say that under this issue the finding of the jury was not correct, or that we ought not to assume that the defendants wished the Sheriff to dispose of the chattels themselves, and not simply the interest of the lessee.

Fourthly.—If the terms of the lease apply to the whole letting and include the chattels as well as the realty, why may not the forfeiture apply? In the view I take of the

case it is not necessary to decide this, but there is much room for argument on this point.

Fifthly.—I have already referred to the ground taken, that the plaintiff is estopped by his statements in the affidavit. The evidence that was admitted and objected was of very little consequence, so far as the real question in dispute was concerned, and it might have been urged that what the witness said was merely repeating what the plaintiff had said, or that he stated matters that of themselves were of no weight. In the end the question of whether there was a lease or no lease depended on the written instruments themselves, as to which there was no dispute, the real contest being as to their legal effect.

In *Green v. Stevens* (2 H. & N. 146) the issue is the same as in this case. The goods had been let with the house and were seized under an execution against the tenant. It was said by *Channell*, Baron, in the argument, "Is not the question, Has the claimant such a title as would enable her to maintain an action against the Sheriff"? and in giving judgment he said: "In the present case the Judge appears to have said that it was not necessary to shew that the goods were absolutely the property of the claimant, if they were hers in any sense. I think that this was a just remark, and if a claimant has any sort of title, it must be taken he has a right to defend it until the contrary is shewn."

Newman v. Anderton (2 New Reports 224).—*Replevin*. Defendant avowed for rent for furnished lodgings. It was contended no distress lay for the rent of the goods. *Mansfield*, C. J., in giving judgment, referred to the resolution in *Spencer's case* (5 Cō. 16 a), and said when the land is leased with stock upon it the rent still continues to issue out of the land only. See *Cro. Eliz.* 606.

See as to lease of goods and chattels, with lands, &c., *Crabbe's Laws of Real Property*, Vol. 2, p. 353, sec. 1466; *Wood v. Ash*, Godb. 112, 1 Leon. 42. See also *le Taverner's Case*, Dy. 56 a; *Ib.* 212 b; 212 a; *Pain v. Whittaker*, (1 R. & M. 99). A piano forte let on hire for a month, seized under an execution against lessee before the expiration of

the month and sold by Sheriff after notice : Held, trover would not lie.

In case of simple bailment of a chattel without reward trover will lie either by bailor or bailee if taken out of the bailee's possession : *Nicolls v. Bastard* (2 C. M. & R. 659, and S. C., Ty. & Gr. 156.)

In *Smith v. Plomer*, where goods were let to a married woman living separate from her husband, as she could not have any property in them, trover was maintainable : 2 *Williams' Saunders*, 47 d, note *g*.

Fenn v. Bittleston, 7 Ex. 152.—Sale of chattels by assignee of a bankrupt, who had a right to retain possession of them for a certain period : *Held*, that owner could maintain trover against assignees.

On the whole, we think, the appeal must be dismissed with costs.

Appeal dismissed, with costs.

MAHAR AND WIFE V. FRASER ET AL.

Ejectment—Mortgage without re demise—Statute of Limitations—No presumption of payment—New trial.

Where there is no re-demise to the mortgagor until default in payment of the mortgage moneys, and the land is vacant at the time of the execution of the mortgage, *Seemle*, that the mortgagee being under such an instrument deemed in possession of the land by operation of law, the presumption of payment of the mortgage moneys after the lapse of 20 years does not arise, even though the mortgagee has never made an actual entry, nor received any payment on account of the mortgage.

A. Wilson. J., *dissentiente*.

The mere fact that the mortgagee is barred by the Statute of Limitations of his remedy on the covenant for the recovery of the money will not establish a payment, so as to re-convey the legal title to the mortgagor.

Ejectment to recover lot 21 in the 8th concession of Cornwall.

The claimants set up title in Margaret Mahar, as heiress at law of her brother Alexander O'Donnelly, who was heir-at-law of James O'Donnelly, deceased.

The defendants, besides denying plaintiff's title, claimed as tenants of Duncan Fraser, who claimed under a deed from the executors of Alexander Parlain, the grantee of James O'Donnelly, who derived his title by several mesne conveyances from the patentees of the Crown.

The cause was tried at the last Cornwall assizes, held before the Chief Justice of Upper Canada.

The title of the land was proven to be in James O'Donnelly, father of the female plaintiff, on the 11th June, 1812. He died 40 or 50 years ago, leaving the female plaintiff and a son, Alexander O'Donnelly, surviving him. There was reasonable evidence given of the death of the son Alexander, and of his mother, so that the right of the female plaintiff to claim as heiress-at-law of James and Alexander O'Donnelly was satisfactorily established.

The defendants put in a deed from James O'Donnelly to Thomas Storrow and others, dated 11th January, 1813, and registered 28th April following, of the lot in question, in the nature of a mortgage.

On behalf of the plaintiff, it was objected that the Christian names of some of the grantees were not given, and therefore no estate passed; and that the word grant was not contained in the deed, nor was any use declared by it.

The learned Chief Justice overruled these objections.

It was proven that the first occupant of the land was a Mr. Wood, who first occupied about 1845; that he went into possession about 21 years ago, and Duncan Fraser's family had been in possession 18 years.

Another witness said that Wood was on the lot before the rebellion, that he stayed three or four years, and that his father bought it from Christopher Hartle.

The learned Chief Justice on this directed a verdict for the defendants.

In Michaelmas term last, *S. Richards*, Q. C., obtained a rule *nisi* to set aside the verdict, as being against law and evidence in this, that plaintiffs shewed title in themselves entitling them to recover: that the mortgage, or deed,

in the nature of a mortgage, set up at the trial, was no defence to the action, having been made in 1813, and the mortgage moneys being payable within three years from the date thereof, and no payment of principal or interest having been made subsequent to the time that the mortgage money became payable, and no possession having been taken, or shown to have been taken, by the mortgagees, or any of them under the mortgage, within 20 years from the time the mortgage money became payable, or since, the mortgage moneys must be presumed to have been paid and the mortgage defeated or made void: that all claim for the mortgage money, if the same was unpaid, was barred by the Statute of Limitations; and on other grounds not material to be mentioned.

This rule was enlarged until the present Term, when *C. Robinson*, Q.C., shewed cause:—

The only question to be discussed is, whether the instrument in the nature of a mortgage, being subject to a defeasance, would be presumed to have been satisfied after twenty years, in the absence of any evidence to show anything done by the mortgagees to assert their rights under it. The other points taken in the rule seem to be considered untenable.

As to the question of payment—there is really no presumption of payment: the negligence to enforce payment is punished by a deprivation of the right to recover, or in other words, there is no payment, but the remedy is barred: *Taylor* on Evidence, 92. There must not only be a presumption of payment, but the payments must be presumed to have been on the days on which they were due, for, if there was any default, the estate of the mortgagees became absolute, and they would then be presumed to be in possession. The proviso in use in this country, for making the conveyance void on payment, has been discontinued in England: *David*. Con. II., 521; *Hay*. Con. 84, note; 3 *Man. v. Ry.* 107, note. There is no proviso in the mortgage that the mortgagor shall be allowed to remain in possession until default, and therefore the mortgagees will under the

deed be presumed to be in possession, because they were entitled to possession under it, and there is nothing to shew that O'Donnelly, or any who claimed under him, independently of the mortgage, ever were in possession since the date of the mortgage. This point is referred to in *Maloch v. McEwan*, 9 C. P., 467, and the cases there cited from 8 Q. B. 895, and 7 Ex. 89.

If the plaintiffs wished to shew that the mortgagor or his heirs were in possession, so as to raise the presumption of payment from that fact, it should have been left to the jury, particularly as by the terms of the instrument and the effect of the statute the mortgagees would be presumed to be in possession.

The plaintiffs did not ask that anything should be left to the jury, and did not object except to the mortgage as an effective instrument.

The mortgagees and those claiming under them have been in possession, and there will never be any presumption against possession: *Tay. Ev.*, 4th Ed., 142; *Richards v. Richards*, 15 East 294, note *a*; *Doe v. Cook*, 6 Bing. 180; *Doe v. Hilder*, 2 B. & Ald. 791; *Sidey v. Hardcastle*, 11 U. C. 162.

The evidence at the trial shewed plaintiffs more than 20 years out of possession.

S. Richards, Q. C., contra:—As to the question of possession, the Judge's notes do not shew that it was left to the jury, nor did the defendants put that as a ground of defence in their notice. If that question is to be raised, the case ought to go to another jury.

After twenty years, and nothing to shew that there was any default, the presumption is that the mortgage money was paid, and paid too at the time it was due: *Atkinson on Titles*, 417, 422–3.

In *Wilson v. Witherby*, *Bull. N. P.* 110, *Selwyn's N. P.* 766, it was ruled by Lord Holt that if the defendant produces a mortgage deed (to a third party) when the interest has not been paid and the mortgagee never entered, it will not be sufficient to defeat the lessor, who claims under the

mortgagor, because it will be presumed that the money was paid at the day, and consequently that it is no subsisting title; but if the defendant prove interest paid on such mortgage after the time of redemption and within 20 years, it will be sufficient to nonsuit the plaintiff. Now here there was nothing to shew that the mortgagee ever entered, and if *Wilson v. Witherby* be good law it ought to govern this case.

In *Doe McLean v. Fish*, 5 U. C. 295, the doctrines of *Wilson v. Witherly* were sustained and adhered to. The head note of that case is, "When a mortgagee has neither taken possession of the land mortgaged, nor received interest upon the mortgage money, within twenty years, the title is in the mortgagor, and the mortgagee, if suing in ejectment a third party in possession, may be non-suited."

By the delay of twenty years in taking any action on the mortgage it is presumed to have been paid according to its terms, which in itself creates a defeasance, and vests the estate in the mortgagor and his heirs: *Doe McKenny v. Johnson*, 4 U. C. 508; *Tay. Ev.* 4 ed. 120.

RICHARDS, C. J.—I have not met with a reference to *Wilson v. Witherby* in any of the later works on real property, nor have I seen it referred to in any of the cases I have looked at except the one in 5 U. C. Reports 295. Taking the doctrine of Lord Holt in the way it is quoted, the plaintiffs' case would fail in this respect, for it is not shewn affirmatively that the mortgagee never entered, and Lord Holt puts that as a part of the case on which he is deciding; and in giving judgment in *Doe McLean v. Fish*, Sir John Robinson remarks: "While the land was in a state of nature, as it was when the mortgage was executed in 1811, the mortgagor was in contemplation of law invested with the possession, holding a patent for the land, and no one occupying adversely to him, the mortgagee recognized him as being in possession by the terms of the mortgage, and stipulated that he might continue so possessed till default should be made in paying the mortgage money. If any part of the mortgage money was unpaid after the

time limited the mortgagee must inevitably have been entitled to interest on the 3rd day of June, 1813, being the latest day. The defendants contend that within twenty years of that time the mortgagee should have entered or brought his action, and that he is now barred. The mortgagee claimed the land by reason of a forfeiture: the time of limitation ran from the time of forfeiture or condition broken. If, finding the land vacant, he had entered on it within the period, he would have been under no necessity of bringing an action; or, if he chose to do so, he might have proceeded as upon a vacant possession; but, never having asserted his right until after some third party has entered, he now for the first time claims possession under his mortgage, on the ground of an alleged default of payment."

Again, in another part of the judgment, he says: "Here, the mortgagee must on a certain day, in case of non-payment, have acquired a right to enter upon the mortgagor, who till default was to retain possession, and having made no claim to exercise such a right, nor offered to prove any default till more than 30 years had elapsed, he is now too late to put the mortgagor to proof of payment. The law presumes that the money was paid at the day, and that the mortgagee never had a right to enter: and if he had such a right, he has lost it. If we were to hold otherwise, then we must hold that in case of a mortgage upon land, which remained unoccupied, the mortgagee might claim to enter, by reason of an alleged breach of condition, at any distance of time; whereas, in order to protect parties against the necessity of proving payment after any indefinite length of time, the law presumes it when the mortgagee has neither taken possession, nor received interest within twenty years."

In *Sidely v. Hardcastle* (11 U. C.) the same lamented Judge uses similar language: "The defendant did not shew the plaintiff (the mortgagor) had made any default: his remaining in possession is *prima facie* evidence that he had not, for by the very terms of the mortgage the mortgagee was to be allowed to enter into possession, if default should be made, but not before default."

There is no redemise in the mortgage now under discussion, no license to the mortgagor to remain in possession until default, and nothing to shew that there was any one else in possession ; on the contrary, the evidence leads to the conclusion that the lot was vacant at the time of the mortgage. *Doe Roylance v. Lightfoot* (8 M. & W. 533), confirmed by *Rogers v. Grazebrook* (8 Q. B. 895), and *Doe v. Davies* (7 Ex. 89), shew that under a mortgage in this form the mortgagee has an immediate right of entry, and under the general doctrine that, in the absence of possession by any one else, the legal owner under a deed of bargain and sale is in possession, the mortgagees were in possession of the mortgaged premises, but the mortgage itself was subject to a defeasance on payment of the money.

If the mortgagor had been in actual possession of the land at the time of the mortgage, and had so remained until after the period of default of payment, there might have some presumption arisen that there was no default, from the possession being consistent with the defeasance ; but when by operation of law the mortgagee is presumed to be in possession, I fail to see how it can be presumed that the mortgage has been paid.

I see the force of the argument, that when by the terms of the mortgage the mortgagor is to be allowed to retain possession until default, you will not presume a default after twenty years until it is shewn ; but when by the terms of the deed the mortgagee is in possession, I fail to see how you can presume that he has paid the money, to make that a void deed which by its terms could only be so by an actual payment of the money. The mere fact that the mortgagee could not recover the money on the covenants contained in the mortgage, because twenty years had passed from the time fixed for its payment, will not establish a payment so as to re-convey the legal title to the mortgagor. Suppose fifteen years after default the mortgagee brought ejectment and recovered possession of the mortgaged premises, the mortgagor in ten years after that could not successfully contend that he was entitled to get back his land, because

after twenty years from default it was to be presumed the mortgage money had been paid ; but if the mortgagor were then sued on the covenant for the payment of the mortgage money, I see no reason why he might not plead the lapse of twenty years as a bar to that action.

In this case, it was intimated on the argument that the mortgagees had taken possession of the land within twenty years, and had brought ejectment against the then occupiers, and that the judgment in the ejectment suit was produced and given in evidence at the trial. If this were so it would seem of little benefit to the plaintiffs to grant them a new trial.

As the point now under discussion was not raised at the trial, and no exception taken to the charge of the learned Chief Justice, a new trial could only now be granted on payment of costs.

But if the effect of the mortgage deed was to put the mortgagees into possession by operation of law, and it seems to us it was so, then it may be that the view contended for by the plaintiffs fails, and the verdict should not be disturbed.

On speaking with the learned Chief Justice, he states that unless the documents referred to by the defendant's counsel are mentioned in his notes, he cannot say they were made a part of the case at the trial. We must, therefore, dispose of this matter without considering the other documents.

If there was a taking of possession by the mortgagees in due time, or a recovery in ejectment, it would seem to complete the title of the defendants, if they claim in privity with the mortgagees, and they may even set it up if they do not claim by such privity.

On the whole, however, we think, the plaintiffs may have a new trial, on payment of costs, if they are advised that they can maintain the title after the views we have expressed. If the rights of the parties were to be settled on the presumptions to arise from the possession by the mortgagees, by virtue of the mortgage itself, without taking actual possession, then the facts should be brought out in such a way

as to enable the parties, if dissatisfied with our judgment, to take the case to the Court of Appeals.

A. WILSON, J.—I think, after so great a lapse of time, the presumption is the defendant has been paid off, and that it is cast upon those, who set up the title of the mortgagees, to give some kind of evidence to rebut this presumption.

J. Wilson, J., concurred with Richards, C. J.

Rule absolute for new trial, on payment of costs.

MARCUS V. SMITH AND RAY.

Agreement for purchase of land—Provision for forfeiture on default—Evidence of election to forfeit—Extension of time for payment—Measure of damages.

Plaintiff, on the 20th January, 1866, agreed under seal with defendants to sell to them certain land for \$5000; \$2500 to be paid on 1st April, 1866, and \$2500 on 1st May, 1866, with interest, and to convey on these payments being made. Defendants covenanted to pay, and that if they made default "the agreement should be void and of no effect, and all moneys paid thereunder up to the time of such default should be forfeited to the plaintiff," and that time should be of the essence of the contract. To an action on this covenant, alleging non-payment by defendants, and their neglect to complete the purchase, defendants pleaded on equitable grounds, that defendants went into possession and paid \$1000, but, having made default in a further payment, the plaintiff evicted and kept them out of possession, and elected to treat the agreement as forfeited, whereby the covenant became void.

At the trial it appeared that the whole purchase money was \$6000, of which \$1000 were paid down, and \$1000 more on the 7th April, 1866, when, by an endorsement under seal on the agreement, the plaintiff extended the time for payment of the balance to 20th May, 1866. Defendants had taken possession under a previous lease, in May, 1865, and expended about \$4000 in boring for oil, and had a steam engine on the premises. They were not interfered with until about the 25th of May, when they were about to move this engine, which the plaintiff refused to allow, saying that they had forfeited the land, having failed to make their payments, and that the property was his and they were trespassers. He brought several men with him who threatened defendants with violence if they attempted to cross the fence into the premises, and he nailed up the engine house, refusing to let defendants enter it. The plaintiff gave evidence tending to shew that his object in this was to obtain payment. The jury having found for defendants upon the plea—

- Held*, 1. That under the agreement defendants were not entitled to rescind on forfeiture of the moneys paid, but that the option was with the plaintiff.
2. That there was evidence to go to the jury that the plaintiff had elected to forfeit the agreement as alleged; and the verdict was upheld.
3. That the endorsement extending the time for payment did not do away with the provision for forfeiture, but incorporated the extended time in the agreement as if originally there.
4. *Semble*, that on a contract to purchase land the measure of damages is the same whether it be under seal or by parol, and that the plaintiffs here could have recovered only damages for the loss of his bargain, not the full purchase money according to the contract.

DECLARATION, that by an agreement under seal, executed by the defendants to the plaintiff, dated 20th January, 1866, it was covenanted between plaintiff and defendants that the plaintiff, upon payment to him of \$5000, with interest, as follows, \$2500 on or before 1st April, 1866, and \$2500 on or before 1st May, 1866, should and would, by a good and sufficient deed, convey, grant and assure to defendants an estate in fee simple in possession unincumbered (save as to a lease thereon made by the plaintiff to one John McMillan), and free from dower, of parts of lot 16, in 16th concession of the township of Orford; and defendants covenanted to pay said sum of \$5000 on the days and times above named. *Breach*, that defendants had not paid \$5000 or interest, nor completed the said purchase on their part, whereby, &c.

Plea, on equitable grounds, that the covenant in the declaration mentioned was contained in an agreement whereby plaintiff, in consideration of \$1000 paid at the time of making the same, and of \$5000 to be paid at the periods in the agreement specified, agreed to convey certain lands and premises therein described to defendants, in fee simple; and it was amongst other things provided that if defendants should make default in said payments, or any of them, said agreement and the covenants therein contained should become void and of no effect, and all moneys paid thereunder up to time of such default should be forfeited. *Averment*, that they went into possession of, and made various improvements and erections on, said land, and paid a further sum of \$1000 on account of said purchase money; but, having made default in a further payment, said plaintiff evicted and

kept them out of possession, and assumed possession himself, and elected to treat said agreement as forfeited, and before commencement of suit declared same forfeited accordingly ; and that the covenant in the declaration mentioned was the covenant for the payment of the residue of said purchase money in said articles of agreement mentioned and contained, and was, by such election to forfeit and forfeiture, rendered void and of no effect.

Issue.

The cause was tried at the last Fall assizes, for the county of Kent, held before Hagarty, J., and a verdict entered for defendants.

The agreement set out in the declaration was put in at the trial, being correctly recited as to the times at which the \$5000 were to be paid. The agreement shewed that the entire consideration for the land (40 acres) was \$6000, \$1000 of which were paid on the execution of the agreement.

The covenants of the defendants were, "that they would well and truly pay, or cause to be paid, said sum of \$5000 on the days and times and in the manner above specified ; and if they made default in said several payments, or any of them when the same became due, the agreement should be void and of no effect, and all moneys paid thereunder up to the time of such default, should be forfeited to plaintiff ; and the times and days above mentioned for the said several payments to be made, should be strictly construed to be, and the same were to be, of the very essence of the agreement : provided always, it was understood and agreed between the parties thereto, that if it should appear that plaintiff was not the owner of said land, or could not lawfully convey the same as aforesaid unto the defendants by a good and sufficient conveyance in fee, when said payments became due, then all moneys paid thereunder should be refunded to said defendants.

On the 7th of April, 1866, one of defendants, Howard Smith, paid plaintiff the further sum of \$1000, and by an instrument under seal, dated 7th April, 1866, endorsed on the original agreement, plaintiff acknowledged and agreed as follows :

“Received from Howard Smith, Esq., the sum of \$1000 on account of the payment due on the within agreement, on the first day of April, A.D., 1866, and I hereby agree to extend and do extend the time for payment of the balance of the purchase money within mentioned to 20th day of May, A.D., 1866.”—Signed by plaintiff, with a seal opposite to it.

It appeared that at the date of the original agreement, defendant Smith was in possession of the leased premises. He had a lease which was about to expire, and had been boring for oil. He in fact was in possession from May, 1865, to May, 1866. It was stated that parties agreeing to purchase by such an instrument usually took possession of the premises.

The purchasers had expended about four thousand dollars in boring for oil, had erected a derrick, and had a steam engine on the premises which they used in conducting their operations.

About the 25th of May defendants sent to the premises for the purpose of taking away the steam engine, but plaintiff refused to permit its removal. They sent several times for it, but plaintiff fastened up the gates and refused to let them take it away; and at one time, when the defendants and their servants were about to take down the fence to remove the engine, plaintiff, with a pitchfork in his hand, and his son with a pistol, said he would shoot any one who would touch the fence. Defendant, Smith, went towards the fence and laid his hand on it, when a man with a revolver, one of plaintiff's party, threatened to shoot him.

On the first occasion plaintiff forbid defendants' servants taking the engine saying they had forfeited the land, having failed to make their payments: he said there were \$4000 due. At another time he forbid plaintiffs and their servants going in, and threatened to shoot them if they attempted to take down the fence. “Plaintiff said the property was his, that they had not paid him; that they had forfeited the land. He said he would let the engine go if they would pay the price of it on the land.”

Another witness, in reference to the same conversations, stated, "Plaintiff said it (the engine) was his, and it should not be taken away; that defendants had not paid the money on the land, and, consequently, land and all improvements were forfeited to him." "Plaintiff said the land was his, and we were trespassing." On another occasion he said it was his land, and they were trespassing.

Plaintiff told the witness the payment had run out, and he had agreed, verbally, to give defendant from ten to fifteen days to make the payment, but he thought that was verbal. He said the engine was his, and defendant had forfeited it.

Plaintiff's son was called, and stated that he was present when they wanted to take away the engine. Plaintiff offered defendant Smith \$1000 for the engine, and to apply it on the land, and give him a longer time to pay. Defendant said he had paid too much already; that nothing was done except to prevent defendants taking away the engine. Smith said he would try and do what he could with the company to get them to pay up. No one was in possession of the well, premises, &c., but plaintiff, who had his crops there. The derrick was about twenty rods from the fence. Plaintiff said he wanted his pay. The witness stated that some of defendants' party presented pistols. Plaintiff nailed up the door of the derrick after they had made default in their payments. He said he never saw defendants in possession of the derrick, or doing anything there.

The defendants' counsel, at the close of the case, contended that the defendants' plea was proven by the production of the agreement; that the forfeiture took place, and that defendant had a right to insist thereon, forfeiting all previous payments.

The learned Judge left it to the jury to say whether the plea was proven in its substantial averments, and if the jury found for the plea, plaintiff had leave to move for judgment *non obstante*, if the amount of the damages were what appeared on the face of the record. The learned Judge was not prepared to assent to the view contended for by the defendants, that there were no damages beyond the pay-

ments forfeited. He inclined to the opinion that the measure of damages was the amount of the specified payments.

The jury found a verdict for the defendant.

In Michaelmas term last, *C. R. Atkinson*, for plaintiff, obtained a rule *Nisi* to enter a verdict for plaintiff for \$4195.22, being the amount due under the covenant sued on, and being the balance of principal and interest up to the 24th of October last, notwithstanding the verdict, on the grounds that the plea pleaded, and on which the jury found for defendant, was no defence to or answer in law or equity to the action on the covenant sued on; or for a new trial on the law and evidence,—on the law in this, that nothing shewn at the trial or before the jury was any legal or equitable answer in bar to the plaintiff's recovery, and, on the evidence in this, that any acts of the plaintiff given in evidence to show an ouster of the defendants from the said land, or to prevent their occupation, were only acts to prevent the defendants from removing a steam engine therefrom; and it was not shown that defendants had ever been in possession under the agreement set out in the plea.

C. Robinson, Q. C., shewed cause:—

No leave was given to enter a verdict.

It was at the option of the plaintiff to rescind the contract, and the plea avers he did so.

The evidence justified the finding of the jury in favor of the plea.

The defendant has also a right to avail himself of the clause avoiding the agreement. The effect of that clause is to give either party the right to avoid the agreement on default, the plaintiff retaining all the money paid up to the time of such default. The principle applicable to the proviso of forfeiture in leases does not apply to this case. Here it is a privilege reserved to the vendee.

The plea is a good plea in equity. Under the agreement the purchasers were undoubtedly expected to take possession, and in equity the payment of interest implies that the pur-

chaser is in possession. The jury found that plaintiff intended to keep defendants out of the land, and of course to avail himself of the forfeiture. Even if this is not considered a good answer, the case then comes within the general rule. Plaintiff has his land, and defendants are only liable to pay the damages which arise from the non-payment of the purchase money. He cannot keep the land and the purchase money both. The rule of damages is precisely the same as when a party sues for goods bargained and sold, where the goods have never left his possession. How much damage has the plaintiff sustained in consequence of the breach of the contract? *Laird v. Pim*, 7 M. & W. 474; *Mayne on Damages*, 95; *Knotchbull v. Grueber*, 1 Madd. 171, 2, 3, S. C. 3 Mer. 124; *Fry Spec. Per.* 284, 10; *Eastern Counties Railway v. Hawkes*, 5 H. of L. Cases 360, per Lord Brougham, and 376, per Lord St. Leonards; *Bullen & Leake's precedents*, 2 ed. 215; 30 L. T. Ch. 230, cited in *Tay. Ev.*, 4 ed. 1011; *Sugden on Vendors*, 629; *Fleury v. Cooke*, 12 Ves. 27. As to right to rescind, *Sugden* 22; *Willson v. Cary*, 10 M. & W. 650; *Icely v. Grew*, 6 N. & M. 467; *Palmer v. Semple*, 9 A. & E. 508; *Saville v. Saville*, 1 P. W. 745; *Dart on Vendors* 776.

Atkinson, contra:—

The rule is not moved on leave reserved; but if plaintiff obtains a judgment *non obstante*, and defendants will not consent to a verdict being entered for plaintiff for the amount of the balance due and the interest, plaintiff can have an assessment of damages without the leave of the Court. *Shephards v. Hall*, 2 Dow. P. C. 453, is an express authority, and shows the proper course is to move for judgment *non obstante veredicto*, though a general verdict was entered for defendants.

The evidence shows there was nothing said about forfeiture until the defendant went to remove the steam engine; and the plaintiff's conduct shows that all he was desirous of doing was to make himself secure that he would be paid for his land according to the agreement. The true construction of the proviso is, that it may be forfeited at the election of

the plaintiff if defendant makes default in the payments : *Roberts v. Wyatt*, 2 Taunt. 168 ; *Doe, dem. Nash, v. Burch*, 1 M & W. 402 ; *Hyde v. Watts*, 12 M. & W. 254 ; *Fry Spec. Per. sec. 691 to 702 inclusive*.

The right to forfeit was put an end to by the second agreement extending the time : *Carolan v. Brabazon*, 3 J. & L. 200, 209. What took place when the defendants went to take away the engine, as to declaring the agreement forfeited, was mere loose conversation. What was done was really a persistence in the agreement. The refusing to allow defendants to go on to the place was not equivalent to an eviction, for there was no proviso in the agreement that the purchaser should be allowed to go into possession : *Knotchbull v. Grueber*, 9 Madd. 153 ; *Pain v. Coombs*, 3 Sm. & Giff. 449 ; *Fry Spec. Perf. sec. 647*.

There could not be any rescission of the contract from this conduct of the plaintiff, for there is nothing in the agreement to show they were to be let into possession ; and the facts do not show they were in possession, and in equity there could be no rescission of the contract without showing the party in possession. Declaring the contract forfeited is not necessarily a rescission of the contract. The plea is not a good equitable defence : *Brennan v. Boulton*, 2 Sm. & Giff. 115.

RICHARDS, C. J., delivered the judgment of the Court.

I am not prepared to assent to the view suggested by the defendants' counsel, that under the terms of the agreement the defendants, at their option, might rescind the contract, the only penalty being that they should forfeit what money they had paid under it if they did so.

In *Roberts v. Wyatt* (2 Taunton 268) the agreement contained a proviso that in case the vendors could not deduce a good title, such as the purchaser should approve of, or if the purchaser should not pay the purchase money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought thereon. It was held that the vendor had

an option to rescind the sale, in case the vendee did not pay the money, and the purchaser had the right to rescind, in case the vendor did not make title, but not *e converso*. In giving judgment, *Mansfield*, C. J., said, "The purchaser cannot say I am not ready with my money, therefore I will avoid the contract; nor can the seller say my title is not good, therefore I shall be off."

In *Doe Nash v. Birch* (1 M. & W. 402) by the terms of the lease the landlord had not only a right to enter, but the agreement was to be null and void: it was held the landlord might waive the forfeiture under such a lease. In *arguendo* Baron Parke said, referring to *Doe Bryan v. Banks* (4 B. & Ald. 401), "the tenant wanted to shew the lease was void by his own act, arguing that he might take advantage of his own wrong, and the Court held that as long as the landlord chose to say it was not void, the tenant should not be allowed to say it was."

From these and other authorities on the same point, and looking at the general principles of law applicable to the subject, I cannot say that I have any doubt that the option of declaring the agreement to be in force from a default committed by the defendants, was still left open to the plaintiff.

I think we may dispose of the case, taking this view of the effect of the agreement, together with the finding of the jury on the plea and the facts as they appeared at the trial. In this case the plaintiff, if it had been for his interest and he desired so to do, could, I have no doubt, have exercised his election to declare the agreement in force, and if he had done so, the authorities seem to establish that the defendants would be still liable to pay the balance due on the purchase money; and if, on the other hand, he preferred to have the agreement according to its terms forfeited and so continue void and of no effect, and declared his intention to that effect, the payments made by the defendants to him would be forfeited. The contract would from thenceforth be of no effect, and the defendants could not recover back any portion of the money they had paid toward the purchase of the property.

The question then remains, Was there evidence to go to the jury to shew that the plaintiff had in fact declared his election as to this instrument?

In a recent case in England, reported in the 4th vol. of Best & Smith, 337, *Ward v. Day*, the question of the effect of provisions in an agreement that it should be void in case default was made in certain payments, was much discussed.

Mr. Justice Blackburn, in his very able judgment in that case, says: "Most of the cases in which the doctrine of election has been discussed have been cases of landlord and tenant under a regular lease, upon which there has been reserved a right of re-entry for a forfeiture, that is, an option to determine the lease for a forfeiture; but this doctrine is not, as Mr. Russell seems to think, confined to such cases. So far from that being so, the doctrine is but a branch of the general law, that when a man has an election or option to enter into an estate vested in another, *or to deprive another of some existing right*, before he acts he must elect once for all whether he will do the act or not. He is allowed time to make up his mind, but when once he has determined that he will not consider the estate or lease, whichever it may be, void, he has not any further option to change his mind. That was decided as early as 14 Edw. 3, in the case cited in the margin of Co. Litt. 211 b. Then arises the question, how is it to be known that the election has been made? It is laid down in *Com. Digest*, Title *Election*, (C. 1) that a determination of a man's election shall be made by express words, or by act. The cases are uniform in this, that when a lease has been forfeited, and there is an election to enter or not, if the landlord either by word or by act determines that the lease shall continue in existence, and communicates that determination to the other party, he has elected that the other shall go on as a tenant, and that the tenancy shall continue, and having done so he cannot draw back, as is also laid down in *Com. Dig.* Tit. *Election*, (C. 1.) "If a man once determines his election it shall be determined forever."

As I understand the evidence, the defendants were in possession of the engine, derrick and other houses and

machinery on the premises, connected with the work of excavating for oil, at the time the agreement declared on was made; that they so continued in possession to the extent of going to and from these houses, &c., as they pleased, until after the default was made in the payment of the purchase money under the extended time given by the second agreement, and after that plaintiff nailed up the premises and forbid the defendants going there, declaring that "defendants had forfeited the land, having failed to make their payments: he said there were \$4,000 due." "Plaintiff said the property was his: they had not paid him: they had forfeited the land. Plaintiff said the engine was his, and it should not be taken away; that defendants had not paid the money for the land, and consequently land and all improvements were forfeited to him."

This was all evidence to go to the jury to shew that the plaintiff had, in the language of the plea, "elected to treat the agreement as forfeited, and had declared the same forfeited accordingly." It is true there were expressions used, as proven by plaintiff's son, that plaintiff offered \$1,000 for the engine and to apply it on the land and give defendants a longer time to pay. "Defendant said he would try and do what he could to induce the company to pay up." This by no means shews that plaintiff was not insisting on his right to forfeit the agreement for the default, and according to its terms, but rather that he was under the impression that by doing so he was securing the steam engine to himself.

It is, as I have observed, evidence to go to the jury, and under the circumstances we are not disposed to find fault with their finding on that point.

The agreement itself makes time of the very essence of the contract, and would, I apprehend, in equity be considered as controlling the rights of the parties.

As to the extension of time by the subsequent agreement, rendering the provision as to forfeiture of no effect, I have not met with any authority that would justify us in coming to that conclusion.

The words of the memorandum are, to extend the time for the payment of the balance of the purchase money, and the proper legal effect seems to me to be to incorporate the extended time into the agreement, as if it had been originally inserted there.

The decisions under the provision in a lease, that if the lessee aliens without consent of the lessor the lease shall be forfeited, do not necessarily prevail here. It is true that the Courts have held in such a case, that when the lessor has once given consent to an alienation, the matter is thrown abroad and there may be any number of subsequent alienations without the consent of the lessor; but the reference frequently made to *Dumpor's Case* by Judges from time to time clearly shews that the decision will be strictly confined to the point expressly decided in that case, and in reference to that provision in leases, in *Doe v. Bliss* (4 Taunton 736) *Mansfield*, C. J., said, "The profession have always wondered at *Dumpor's Case*." Lord *Eldon*, in *Brummell v. Macpherson* (14 Vesey 175), says, "Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land." "There is some distinction, in respect of *waiver*, between a condition against underletting and against assignment; for in the former case, if the lessee underlet, and the lessor accept subsequently accruing rent, so as to waive the forfeiture, still, if the lessee, after the expiration of that term, make another underlease, the lessor may re-enter: *Doe v. Bliss* (4 Taunt. 735); but if the lessor were, by acceptance of rent, to waive the forfeiture incurred by the lessee's assignment there would be an end of the condition altogether, exactly as there would be if he had licensed it: *Lloyd v. Crispe*, 5 Taunt. 249; 1 *Wm.'s Saunders*, 288, b. n. x. See 5 B. & Ad. 781. And it has been thought that even if the lessor were expressly to license the lessee to underlet, still the lessee might incur a forfeiture by making a fresh underlease after the expiration of that licensed for, that the license would in that case only operate as a suspension of the condition, and a condition may be suspended though it

cannot be *apportioned*.—1 *Wm.'s Saunders*, 288, *n. s.* :''
Note to Dumpor's Case in 1 *Smith's Leading Cases*, 39.

The rule that you must construe provisions as to forfeiture strictly is one that is constantly referred to, but the modern decisions seem to be based on the more rational rule, to carry out the intention of the parties in making the agreement. Now here, it seems to me, that all the parties intended to do by the endorsement on the agreement was to extend the time of paying the balance due in such a way as to construe the two agreements to be of the same effect, and subject to the same terms and conditions as if the extended time had been that inserted in the original agreement. The conduct of the parties shews that they themselves put that construction on it, for the plaintiff seemed to consider after the extended time had passed that the defendants had forfeited their agreement and acted in that view, whilst the defendants, apparently, by removing the machinery, abandoned the further pursuit of the original intention of making the purchase available by obtaining oil.

As to the question of damages—If the agreement had not been under seal and the plaintiff had sued *in assumpsit*, *Laird v. Pim et al.* (7 M. & W. 474) is authority to shew that the question of damages would be one for the consideration of the jury, if the plaintiff is entitled to any damages at all. That case is referred to in *Mayne on Damages*, 95; and reference is made to an action brought against a party who declines taking goods that are purchased. If the party has his goods he cannot recover the value of them and keep them also: all he can recover is the damages he may have sustained for the breach of the contract. If the goods are of less value than when sold, or other circumstances have occurred to enhance the plaintiff's damages, a jury may take all into consideration and find up to the price of the goods sold.

Indeed, in cases of this sort, the reason why it is considered necessary to invoke the aid of a Court of Equity to enforce the specific performance of contracts is, the inadequacy of the relief given in the Courts of Law: the seller has the

land, which he does not want, and has not the money which he does want, and which by his agreement he ought to get. In *Eastern Counties Railway v Hawkes* (5 H. of L. Cases at P. 360) Lord *Brougham* says, "If the vendor be driven to his action at law, he retains the land and can only recover the difference between the stipulated price and the price it would probably fetch if resold, together with incidental expenses and special damage." At P. 376-7, Lord *St. Leonards* said, "The vendor would be left with the estate on his hands and would recover damages only according to the views of a jury."

I can see no reason why in an action of covenant there should in this respect be any difference as to the rule to be laid down in assessing damages. The action of covenant sounds in damages, and after breach accord and satisfaction may be pleaded, though before breach it cannot be pleaded, in bar to an action on the covenant. In *Comyn's Digest*, Accord (A.1) it is laid down, "So in covenant after the covenant broken, for the suit does not accrue by the deed, but by the subsequent breach." It is not necessary, in the view we take of this case, to decide whether it was the duty of the learned Judge to leave it to the jury to find the damages according to the views expressed in *Laird v. Pim et al.* If the point should again arise it will be open for the parties interested to have it put in a proper shape to get a decision on the question, whether there is any different principle involved in assessing damages in an action for the breach of a parol agreement and in one for the breach of one under seal, to justify a different rule being laid down in estimating the damages.

On the whole, we think, the plaintiff's rule must be discharged.

Rule discharged.

BURNSIDE ET AL V. MARCUS.

Fixtures—Replevin—Lease or License to occupy for oil purposes—New trial refused.

As regards the question of fixtures, the tendency of modern decisions seems to be to effectuate the apparent intention of the parties at the time the article in question was attached to the freehold.

In this case, defendant leased to M. a certain lot of land for 25 years, for the purpose of boring for oil, salt, or minerals, with right of ingress and egress in a certain designated manner. M. was to pay an advance of \$35 on oil, and one-eighth part, every three months, of all oil obtained, and was to be allowed two years for testing the oil bearing character of the land, when, if oil were not found in paying quantities, the lease was to be null and void, and plaintiffs were to return the \$35 advanced. Defendant was to have the free use of the premises for agricultural purposes, except such portions as should be required for the oil operations.

Before the expiration of the two years, a steam engine belonging to plaintiffs was placed by them upon the land, for the purpose of drilling the rock and experimenting for oil. It rested on sills let into the ground, and was fastened to the sills by bolts and spikes. It was similar to others which it appeared were movable, and were used on the surface for the purpose of sinking shafts to test whether or not there was oil there. The two years having elapsed without M. obtaining the oil, defendant declared the lease forfeited, and resumed possession of the land, and claimed the engine as part of the freehold:

Held, that under the facts disclosed, the engine was not a fixture; for that the evident intention of the parties to the instrument was, that the first proceeding should be to ascertain whether oil could be obtained, which was but a temporary proceeding, and therefore any machinery used for the purpose could not be said to have been placed there for the permanent benefit of the inheritance, nor yet as trade fixtures, for neither then nor afterwards had any trade been carried on there; besides, the object of any annexation to the soil was merely to steady the engine, and not to improve the inheritance.

Quere—whether the instrument in question amounted to a lease, or was a mere license to bore for oil, salt, or minerals.

Replevin for a steam engine.

Plea, on equitable grounds, that defendant, by an indenture of lease, or license to bore for oil, demised to one *John McMillan*, on the 12th of July, 1864, for a term of 25 years, for the purpose of boring for and procuring oil, salt, or other minerals on the lands in the declaration mentioned (lot 16 in 16th con. of Orford), together with the rights of ingress and egress on or along the roads or alleys on said land, reserving to the defendant the full and free use of the said demised premises for agricultural purposes, saving and excepting such portions as might be used and occupied by the said *John McMillan* for the buildings and

operations in any oil wells that might be sunk on said land; and the said *McMillan* covenanted, in consideration thereof, to pay as an advance \$35, and at the end of every three months of the term, the one-eighth part of all oil obtained from the premises, at the current market price, and that he would commence to bore for oil within nine months from the date thereof; and in case that, after testing the land for two years from the date thereof, oil was not got in quantities sufficient to pay for working the same, the said lease or license should be considered null and void: *Averment*, that after the execution of the lease, and before the expiration of the two years, *McMillan* and his assigns entered upon a portion of the land and erected a derrick or building for boring and obtaining oil, and an engine house, steam engine and boilers, being the steam engine mentioned in the declaration, and machinery for the purpose of boring for oil, which thereby became and were part of the realty on said land, and sank a well to the rock in search for oil, but did not make a proper test on the lands, so as to test whether oil could be obtained in paying quantities, but abandoned the search for oil long before the expiration of the two years; and the term of two years having elapsed, and the said *McMillan*, or his assigns, not having obtained oil in paying quantities, defendant entered and took possession of said lands and buildings, derrick, steam engine, boilers, and machinery, so occupied by said *McMillan* and his assigns, (the same not having been theretofore loosened or attempted to be removed), by reason of the forfeiture of the said demised term, and declared the same forfeited and ended, and the said lease and the buildings and steam engine and their appurtenances being fixed in the said land, and not having been removed before the expiration of the said term, became the property of the defendant, subject to the agreement of sale thereafter mentioned; and that on the 20th of January, 1866, by an agreement with *Smith & Ray*, two of the plaintiffs, defendant, in consideration of \$1000 in hand paid, and of the due payment of the further sum of \$5000, with interest, as follows, \$2500 on or before the 1st

of April then next, and \$2500 on the 1st of May then next, agreed (subject to all such rights as might be declared to exist under the lease before mentioned and specified as about to expire on the 12th of July then following), by a good and sufficient conveyance, to grant and assure unto *Smith & Ray* an estate in fee simple in possession unincumbered, save as aforesaid, in certain portions of the land thereinbefore described, inclusive of the lands taken possession of under the said lease, on which said oil well, derrick and engine house were situate, saving an acre there described, making in all 40 acres; and *Smith & Ray* thereby covenanted to pay the said moneys; and it was thereby declared that in case default should be made in the payment of any of the said moneys, the agreement should become void, and all moneys theretofore paid should become forfeited; and that after taking possession of the said lands on which the said oil well, buildings, derrick, engine house and steam engine were situated, after the happening of the forfeiture of the said lease, he remained in undisturbed and continuous possession of same until when, &c., said *Smith & Ray*, having made default in payment of the moneys covenanted to be paid, defendant refused to allow plaintiffs to enter into possession of said lands, as of right under said agreement they had no claim to possession until payment of the residue of said moneys was duly made, and refused to allow plaintiffs, then pretending to claim the said steam engine, to tear it up from the said engine house and the soil to which said steam engine and its framework were affixed, until the completion of said agreement by the said plaintiffs or their assigns, which was the detention complained of.

Issue.

The cause was tried at the last Fall assizes held at Chatham, before *Hagarty, J.*

Evidence was given of the facts stated in the plea, and it further appeared that one *Young*, claiming through some title said to have been derived through *McMillan*, went into possession of the leased premises so far as to bring an engine there, and commenced sinking a well. This

engine was removed by plaintiffs when the surface drift was got through, and the engine, which was the subject of this action, owned by plaintiffs, was brought there by them, in the month of November, 1865, to be employed in drilling the rock. The drilling proceeded under them until operations were stopped in consequence of a portion of the pipe having broken. On the 20th of January, 1866, two of the plaintiffs entered into an agreement with defendant for the purchase, in fee simple, in possession unincumbered, of the part of the lot in question, which included the derrick and oil well then on the premises, one of the lines running two rods southerly from where said derrick and engine house then stood, containing 40 acres.

[The terms of the agreement are set out in the report of the preceding case.]

The son of the defendant, in his evidence, stated that notice was given that defendant would insist on the forfeiture: "After the term was up he nailed up the doors of the engine and derrick house. When defendant entered he declared the lease void. He did not know about the sale, that is, about his declaring the sale void. Defendant said he would forfeit the lease. They stopped boring because their time was up. (He described the engine as resting on sills let into the ground, fastened to the sills by bolts and spikes). The engine so remained fastened from the time the defendant fastened up the house until it was removed by the Sheriff. Plaintiff sent some one there to take the engine away: defendant forbid him, saying it was his: they desisted. Next thing the Sheriff came to replevy it. The top sills were chopped up where bolts were: the soil was removed: spikes were chopped out. Defendant was in possession from the nailing up until the Sheriff came. Such engines are sometimes removed: it is not used or required to work the farm."

It was admitted that default had been made in the May payments, and that the writ of replevin was executed in June. The learned Judge left it a question of fact whether plaintiffs were owners of the engine, independently of the question of how far annexation of it to the freehold would make

it the property of defendant. He also told the jury that the evidence of annexation to the freehold was not sufficient to make it part of the realty so as to vest it in defendant against an intending purchaser of the land, who, otherwise owning the chattel, had made default, after bringing, as purchaser, chattels on the land.

This charge was objected to by defendant's counsel.

The jury found that plaintiffs were the owners of the steam engine, and rendered a verdict for the plaintiff for £1.

In Michaelmas term last, *C. R. Atkinson* obtained a rule *Nisi* to set aside the verdict for misdirection in the learned Judge, in charging the jury that the issue for them to try was whether at the time the Sheriff came to replevy the engine it was the plaintiffs', and if they could answer that question he would direct how the verdict should be entered, and withdrawing from the jury the consideration and finding yea or nay, on the facts set up in the plea: that the learned Judge refused to place the facts in evidence sustaining the said plea before the jury, or to allow them to find on such facts.

That the said verdict was contrary to law and evidence in this, that the facts set up in the plea were proved at the trial, and they in law negatived the plaintiffs' right to remove the said engine; and contrary to evidence in this, that upon the evidence the finding should have been in favor of the defendant.

Or why a non-suit should not be entered, pursuant to leave reserved; or, why judgment should not be arrested and all proceedings had thereon stayed, on the ground that the action was not maintainable, and that the engine, being affixed to the soil at the time of the commencement of this action, an action of trover, detinue or replevin would not lie for the same, being a fixture; that it was not repleviable even as a trade fixture, especially as the tenancy had ended and the defendant had taken possession thereunder.

This rule was enlarged to the present term, when *T. H. Spencer* showed cause:—

This engine could never have been considered a fixture : it was merely put on the premises for the purpose of boring for oil, and was never intended to be for the permanent advantage of the freehold : *Lancaster v. Eve*, 5 C. B. N. S. 717. By the terms of the agreement between two of the plaintiffs and the defendant, the agreement was to be forfeited, and the only rights defendant had under that arrangement were to retain the moneys paid under it, not to detain the steam engine belonging to plaintiff. Besides, the two years allowed under the first lease had not expired when the two plaintiffs bargained for the land, and no attempt was made to retain the engine until after default made in the new agreement.

(See *McDonald v. Weeks*, 8 Grant 297 ; *Redfield on Devises*, chapter on Fixtures, noted in 42 Law Times 164 ; and also in 2 U. C. L. J. N. S. 199).

The putting up of the engine by the plaintiffs before they had bargained for the purchase of the land, was only for a temporary purpose, viz, to see if oil could be obtained in paying quantities, and the lease, as drawn, appears expressly to be first for that object, and afterwards to work the wells if the oil was found. He referred to *Hellawell v. Eastwood*, 6 Ex. 295 ; *Waterfall v. Penistone*, 6 E. & B. 876 ; *Fisher v. Dixon*, 12 C. & F. 312 ; *Mather v. Fraser*, 2 K. & J. 536 ; *Walmsley v. Milne*, 7 C. B. N. S. 130 ; *Patterson v. Johnston*, 10 Grant 583 ; *Lawten v. Lawten*, 3 Atkins 13.

Atkinson, contra :—

The plea sets out the facts. At first a portable engine was used, afterwards a permanent one : the same was affixed in such a way as to indicate permanency—let into the ground two or three feet below the surface. The engine having been placed there during the currency of the lease, and remaining there a fixture after the lease was forfeited, it became the property of the lessor. Under the most favorable view for plaintiffs, the engine being on the premises when the agreement was made, defendant had an equitable mortgage on it to secure the payment of the purchase mo-

ney of the land, and plaintiffs had no right to take it away or replevy it until defendant was paid for the land. The plaintiffs were in default under the lease on the agreement: *Harris v. Malloch*, 21 U. C. 82; *Walmsley v. Milne*, 7 C. B. N. S. 130.

The fixture was removed by the Sheriff. The engine could not be replevied while it was affixed to the freehold: *Horn v. Baker*, 9 East. 215; *Minshall v. Lloyd*, 2 M. & W. 450; *McIntosh v. Trotter*, 3 M. & W. 184; *Leader v. Homewood*, 5 C. B. N. S. 546; *London Discount Co. v. Drake*, 6 C. B. N. S. 807; *Lyon v. Russell*, 1 B. & Ad. 394.

RICHARDS, C. J., delivered the judgment of the Court.

We had occasion to consider the question of fixtures in the *Great Western Railway v. Bain*, and we there referred to most of the recent cases cited on this argument, and many more, and the judgment states the difficulty of reconciling the different decisions and dicta on the subject.

The question arises whether the steam engine was a *fixture* or not; for, if a fixture, then, I apprehend, an action of replevin would not lie, if it remained at the time of the commencement of the action in the same state that it was placed by the plaintiffs, and it was at that time to be considered a fixture.

The tendency of modern decisions seems to be to carry out what may seem to be the intention of the parties at the time the article, which would otherwise be considered a chattel, was attached to the freehold. If the person affixing it was the owner of the freehold, or a mortgagor in possession, in the absence of anything to show an intent to keep the chattel, machinery, &c., separate from the freehold, it will be presumed it was for the profit of the inheritance, and very slight affixing would make it a part of the inheritance. But if it was for a mere temporary purpose, or the more complete enjoyment or use of it as a chattel, then it would still retain its original character.

In considering the matter before us it will not be neces-

sary that we should embarrass ourselves with considering the effect of the agreement for the purchase of the defendant's land made between him and two of the plaintiffs. It appears to have been made subject to the terms of the lease or instrument between defendant and McMillan, probably so as to protect the former from any action in consequence of any of its provisions, and defendant himself claims to retain possession of the steam engine under that instrument.

It may well be doubted if the indenture of 12th February, 1864, can properly be considered a lease: it seems rather in the nature of a license granted to McMillan for the purpose of boring, digging for and procuring all the oil, salt or other mineral on the lot in question; and the provision in the instrument that the defendant should have full and free use for agricultural purposes of the aforesaid *leased* premises, except such portions as are occupied with the buildings and operations of the oil wells, is inconsistent with the idea of a lease of the land. Then follow the words, "All taxes on the aforesaid *oil* lease, buildings and stock, to be paid by the lessee."

In the receipt on the back of the instrument the lessor acknowledges to have received the \$35, "being an advance on oil to be obtained from the *oil* lease on my farm (naming the lot and concession), and should at the end of the time for testing said oil land no oil be got," he binds himself to return the amount.

It does not appear that the parties intended the lessee to have any further interest in the land than to obtain the oil, and the lessee was to have the necessary ingress and egress for that purpose, and the portion of land necessary for the buildings and operations connected with the oil wells.

The evidence shews that of the steam engines used on the land the first one was movable, and the one now in dispute was similar to others that have been moved. These engines seem to bear the character of complete machines used on the surface of the ground for the purpose of sinking the necessary shafts to test whether the oil could be found underneath or not. It was evidently the intent of the parties to this

instrument that the first proceeding should be to ascertain if oil could be there obtained, and two years were allowed for that purpose. This surely was but a temporary proceeding, and any instruments or machinery brought there for that purpose could not be then said to have been placed there for the permanent advantage of the inheritance; nor as a trade fixture, for at that time nor since has any trade been there carried on. If the oil wells had been ascertained and the engine had been placed there to bring up the oil, so that the parties might be considered as engaged in the trade or business of procuring or selling oil, then it might possibly be considered a trade fixture.

If the defendant himself had placed the engine there for the purpose of testing whether there was oil beneath or not, and he had died, would the engine have gone to his executor or to his heirs? When we look at the surrounding facts, and find that by the terms of the instrument the defendant is even to return the \$35 he received towards his share of the oil, that was expected to have been obtained, in the event of the failure at the end of the two years, how can we say that it can possibly be held that the lessee of the oil, by carrying out the agreement and continuing to work to the last hour of the two years, is to lose the machine he was working with, of the value of two thousand dollars, whilst he gets back the \$35 he advanced? Surely this was never in the contemplation of the parties. The general doctrine seems to be that whether a chattel attached to the soil was a fixture was always a question of fact depending on the circumstances of each case. The object of any annexation to the soil here was merely for the purpose of steadying the engine, and not for the purpose of improving the inheritance.

Suppose this defendant, instead of entering into the agreement referred to, had agreed to give these plaintiffs a certain sum of money to sink a well on his land and thoroughly test it for oil, and in pursuance of that agreement the plaintiffs had brought their engine there and attached it to the soil in the same way as this is said to have been, would the plaintiffs have lost their engine, and would it have become a part

of the defendant's farm? I should think not. I cannot see that what was done under the agreement referred to would or ought from the terms of the instrument or conduct of the parties give the defendant any greater right to hold the plaintiffs' engine than if he had brought it there under a simple agreement to sink the well for him.

I think the facts in *Hellawell v. Eastwood* would have warranted the court in holding the machinery there in dispute fixtures much more than in this case.

Lancaster v. Eves (5 C. B. N. S. 717) is decided upon principles that would well warrant a decision in favor of the plaintiffs. There the plaintiffs were possessed of a wharf in the Thames, in front of which was a pile which had more than twenty years *ago been driven into the bed of the river* by the then occupiers of the wharf, and had remained there without interruption from the Crown or the conservators of the river, and which was essential to the use and enjoyment of the wharf: *Held*, that from the fact of the ownership not being disputed, the Court was justified in presuming that the pile had been placed there in virtue of an easement, with the consent of the owners of the soil, and that a sufficient possession remained in plaintiff to maintain an action for destroying the pile.

The head note of the case is, "The presumption that that which is annexed to the soil becomes part of the soil, may be rebutted by circumstances shewing the intention of parties to the contrary."

In arguing the case, the broad ground was taken and stoutly contended for, "that by the mere act of annexation a personal chattel immediately becomes part and parcel of the freehold itself: *Quicquid plantatur solo, solo cedit*. Now, every case in which there is a right of severing a thing from the freehold by virtue of the law of fixtures is considered as an *exception* from this general rule. In arguing that case, *Wood v. Hewitt* (8 Q. B. 913) was referred to, where it was suggested if a man plants a tree in another's soil, or builds a wall upon it, the tree or wall becomes the property of the land owner, and the same principle applied

in the case before them. Lord *Denman* said, "It might have been understood by both the parties that the fender (the subject of the action) should be considered a separate chattel. That is less likely to be the case with a tree, because the tree could not be removed without destroying it; and in giving judgment he said, "the question is whether, because the fender in this case had been placed on the defendant's soil, it became his property as a necessary consequence of its position. I am of opinion that such a consequence never follows of necessity when the chattel is separable. This appears sufficiently from *Rex v. Otley* (1 B. & Ad. 161). The decision of *Maul v. Collins* is so far an authority in point of law as it shows that in a case of this kind it is always open to enquiry how the article came to be in the place in which it is found, and what the parties intended as to its use, and the respective rights may be determined by the evidence on these points."

In giving judgment in *Lancaster v. Eves*, *Cockburn C. J.* said, "The fair inference is that the pile was driven into the bed of the river in the exercise of a right or easement, and that it never was intended that the Crown or any other body or person should acquire any right or property in it, but that it should continue the property of the occupiers of the wharf, with the right to remove it at their pleasure."

Williams, J., said, "It is clear that the mere putting a chattel into the soil by another cannot alter the ownership of the chattel. To apply the maxim *Quicquid plantatur solo, solo cedit*, there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil."

The case in 3 Atkins, 14, of *Lawton v. Lawton*, and of *Dudley v. Warde* (Amb. 113), shew that Lord Hardwicke did not consider steam engines used in working coal mines necessarily became fixtures.

At the close of the plaintiff's case there was a general objection to the charge of the learned Judge, but it is not noted in what way it was desired that the matter should have been placed before the jury; but from the rule *nisi* it may be in-

ferred that it was contended that the jury should have been told that under the evidence the steam engine was a fixture and could not be removed from the soil by the tenant except during his term, and that before being separated from the freehold it could not be replevied.

We do not think it would have been proper to have told the jury this; on the contrary, the facts being undisputed, we think, the learned Judge was right in telling the jury that the engine was not a fixture. The defendant's plea, if a defence to the action at all, amounted to a denial of the property in the engine in the plaintiffs, and substantially claimed the property as his own from being annexed to his freehold. Looking at all the facts of the case, we think, there really can be no doubt that the engine never lost its character as a chattel.

It does not seem that the view of the case now presented was prominently brought out at the trial, but the question of whether the engine could properly be considered to have lost its character as a chattel seems to have been present to the mind of the learned Judge on the facts as they came out. We think all the circumstances shew so clearly that the engine never ceased to be a chattel that it would be of no service to the defendant to grant a new trial to have the case fully considered before a jury on the grounds now taken, though under other circumstances we might have felt it right to do so.

We think the rule must be discharged.

Rule discharged.

MEMORANDA.

During this term the following gentlemen were called to the Bar:—F. T. JONES; J. G. SMITH; G. P. LAND; JAMES H. FRASER; JAMES WATT; — MERRILL; — MUDIE; G. L. McCAUL; W. H. WALKER; C. SEAGER; F. C. DRAPER; W. LYNN SMART; W. H. WETENHALL.

In the Court of Queen's Bench and the Court of
Common Pleas.

REGULÆ GENERALES.

"Hilary" Term, 30th Victoria.

IT IS ORDERED,—That the following rules shall come and be in force in the Courts of Queen's Bench and Common Pleas, from and after the last day of this present Hilary Term :—

1. In "Easter" and "Michaelmas" Terms, the first Friday, the second Monday, the second Wednesday, and the third Monday, shall be "PAPER DAYS" in the Court of Queen's Bench; and the first Saturday, the second Tuesday, the second Thursday, and the third Tuesday, in the Court of Common Pleas.

2. County Court Appeals must be set down for argument for the first or second Paper Days of each Term, such day being the first Paper Day next after the date of the Appeal Bond, unless leave be granted by the Court, upon special affidavit, to set it down for a subsequent Paper Day: and the Court will hear County Court Appeals on the first and second Paper Days of each Term in preference to the other cases set down upon the Paper.

3. On the last Tuesday and Friday in "Easter" and "Michaelmas" Terms, the Court of Queen's Bench, and on the last Monday and Wednesday, in the said Terms, the Court of Common Pleas, will take the New Trial Paper, and proceed therewith, in like manner as on the other days appointed by Rule of Court for that purpose.

Dated 12th February, A.D. 1867.

(Signed)

WM. H. DRAPER, C.J.

WM. B. RICHARDS, C.J., C.P.

JOHN H. HAGARTY, J., Q.B.

JOS. C. MORRISON, J., Q.B.

ADAM WILSON, J., C.P.

JNO. WILSON, J., C.P.

Certified

L HEYDEN,

Clerk of the Crown and Pleas.

IN THE
COURT OF ERROR AND APPEAL.

REGINA, *Respondent*, v. CHARLES HUNT (Defendant in the Court below), *Appellant*.

Highway—Evidence—Adoption by Crown of original survey and consequent inability to alter—Grant to private individual.

In the year 1826 the original town-plot of London was surveyed under instructions from the Crown, and the plan of such survey, with the field notes, shewed that two of the streets, for obstructing portions of which the defendant was indicted, were extended to within four rods of the river Thames which runs through that town. The overseer of highways for the years 1829, 1830, 1831, stated that he had traced the streets in question all through; that the posts were there; that he opened the streets by the posts; that there was a road reserved four rods along the river bank; that one of the streets ran down to the river, and the posts were then four rods from the river when he opened that street.

In 1832 one R. was duly instructed to survey a mill site in the town, and to lay off for the purchaser such ground as might be necessary, and he thereupon ran a line which crossed these two streets as designated upon the original plan, and cut off portions of several town lots laid out upon this plan.

In 1839 a mill site was sold by the Crown Land Agent to one B. (under whom the defendant claimed), not according to R.'s survey, but according to a small plan obtained from the original surveyor, and the patent which issued in 1846 appeared to grant the land designated on this plan, making no reservation of streets, but including the extensions to the river of the streets in question, as laid out upon the original plan.

Previously, also, to this sale, lots had been sold on these streets by the proper authorities; the streets had been worked and improved, and one in particular was open to the river, and the other as far as where the obstruction stood:

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 145, that the evidence conclusively established that the streets in question had been laid out in the original survey of the town to within four rods of the river, and that this space was left open for public use; that the existence of these streets as public highways was shewn by the work on the ground at the original survey, and by the adoption, on the part of the Crown, of that work as exhibited on the plan thereof returned, which adoption was established by the disposition of lands according to that plan and survey; that thereby these streets became public highways; and although prior to such adoption the Crown would not have been bound by either plan or survey, after such adoption there was no power of making such an alteration as would be necessary to establish the defence set up.

Appeal from the judgment of the Court of Common Pleas, reported in 16 C. P. 145, where, as well as in the judgment of this Court, the facts will be found fully stated.

Irving, Q. C., and *Christopher Robinson*, Q. C., for the Appellant, besides the authorities cited in the Court below, referred to 7 Geo. 4, ch. 14; *Badgley v. Bender*, 3 O. S. 221, per Macauley, J.; *Kissock v. Jarvis*, 6 C. P. 393.

James Patterson, contra, cited, as additional authorities, 4 Geo. IV. ch. 10; 50 Geo. 3, ch. 1; *Russell on Crimes*, 339, (a).

DRAPER, C. J., delivered the judgment of the Court, (March 14th, 1867.)—

In 1826 the Legislature of Upper Canada passed an Act directing that a town should be surveyed within the reservation made with that object in the townships of London and Westminster, in the County of Middlesex, and on the 22nd of March, 1826, instructions were given to Colonel M. Burwell to make the survey.

A certified copy of the office plan, which is explained by a note thereupon to be the plan by which the sales of lots are carried out, was put in evidence on the trial, by which it would appear that (among others) two streets were laid out, one running north easterly and south westerly, called Horton street, the other running at right angles to it, called Ridout street. The plan shews a third street, parallel to Ridout street, and to the east of it, called Talbot street.

The land afterwards granted for a mill site was not marked upon this plan. The obstruction complained of in the first count in the indictment is, digging and keeping a ditch across and upon Ridout street and erecting and continuing a fence across Talbot street. Access to the river by continuing along the lines of each of these streets was and is there obstructed, and the question is whether these streets, at the time named in the indictment, viz. on the 1st of October, 1864, and the places where these obstructions existed, were or either of them was part of Ridout street or of Talbot street, respectively.

(a) The case was argued on the 21st January, 1867, before Draper, C. J., VanKoughnet, C., Richards, C. J., Hagarty, J., Morrison, J., A. Wilson, J., Mowat, V. C.

On the 24th of November, 1832, instructions were addressed by the then Surveyor General to Mr. Rankin, a Dy.P.S., to survey a mill site in the town of London, and to lay off around the mill site, for the party who might purchase, such a portion of ground as to Mr. Rankin might appear requisite.

From Mr. Rankin's report (28th of January, 1833,) which I assume to have accompanied his plan of survey (a certified copy of each being before us), it appears that he ran a line as the eastern boundary of what he proposed should be the mill site and portion of ground to be attached thereto. This line crossed Talbot street, Horton street, and Ridout street, as designated upon Colonel Burwell's plan, interfering with and cutting off portions of several town lots laid out upon that plan. Only one of these lots, however, seems to have been located at that time, and that lies without the boundaries of the mill site, as actually granted.

On the 19th of August, 1846, Letters Patent under the Great Seal of Canada were issued, reciting a sale to John Balkwell, in consideration of £303, of the lands thereafter mentioned, and granting to him in fee that parcel of land in the town of London containing by admeasurement fourteen acres, composed of the mill site on the east branch of the River Thames on the southerly side of Horton street, and described by metes and bounds, so as to include the parcel of land, but never in any part crossing the southern boundary of Horton street. The description, however, which commences at a point four chains and forty-two links distance, on a course south $68^{\circ} 12'$ west from the western limit of Ridout street produced, includes all that portion of Ridout street, as laid out upon the office plan, which lies between the south side of Horton street and the river, and the boundaries given in the Letters Patent cross Talbot street diagonally and include part of lot 15, south of Simcoe street, the whole of lot 15, and part of lot 14 north of Grey street, and cross Grey street, including as much of Talbot and Grey streets as, according to the office plan, lie between the northerly limit of this mill site and the River Thames.

The evidence, in my opinion, conclusively establishes that both Ridout and Talbot streets were laid out in the original survey of the town plot of London to within four rods of the River Thames, and that this space of four rods was left along the bank of the river open for public use. The evidence of Simeon Morrill, who was overseer of highways in 1829, 1830 and 1831,—that he traced the streets in question all through ; that the posts were there ; that he opened the streets by the posts ; that there was a road reserved four rods along the river bank ; that Ridout street ran down to the river, and that the posts were then four rods from the river when he opened that street,—is uncontradicted, and is corroborated by the office plan and field notes of the original survey.

The mile site was not sold until the 21st of October, 1839. Mr. Rankin's survey of a mill site was made between November, 1832, and the latter part of January following. It included a much larger quantity of land and interfered with the original survey of the town to a much greater extent than the mill site subsequently granted. It evidently was not adopted by the authorities, for Colonel Askin, who, as Crown Land Agent, offered to sale and sold the mill site, was not furnished with a copy of it, and, as he stated in his evidence at the trial, knew nothing of it, and he sold according to a small plan which he obtained on his own application from the original surveyor, having only from the Surveyor General's Department a plan which shewed nothing about a mill site. Although it is not distinctly proved, yet the only conclusion to be drawn from what does appear is, that the Letters Patent of the 19th of August, 1846, grant the land designated in the small plan of which Colonel Askin speaks, and which he transmitted to "the Government," meaning, I presume, the Surveyor General's Department, from which all descriptions for patents were issued.

But, prior to this sale, lots on these streets had been sold by the proper authorities, these streets had been worked and improved, and Ridout street especially was open to the

River, and Talbot street as far as where the obstruction complained of stands, and being artificially unobstructed, though not cleared out or worked as a street as Ridout street had been.

I agree, therefore, entirely with the conclusion arrived at in the Court below, and upon this ground, that the existence of these streets as public highways is shewn by the work on the ground at the original survey, and by the adoption, on the part of the Crown, of that work as exhibited on the plan thereof returned, which adoption is established by the disposition of lands in accordance with such plan and survey. Thereby, in my opinion, these streets became public highways, and although prior to such adoption the Crown would not, as I think, be bound by either plan or survey, after it, there remained no power of making such an alteration as is necessary to establish this defence.

I think the appeal should be dismissed with costs.

Appeal dismissed, with costs.

THE COMMERCIAL BANK OF CANADA V. COTTON ET AL.

Banks—Interest—Con. Stats. C. ch. 58, sec. 9—29 and 30 Vic. ch. 10, sec. 5.

Held, affirming the judgment of the Court of Common Pleas (ante p. 214) Draper, C J., VanKoughnet, C., and Mowatt, V. C., *dissentientibus*, that the 29 and 30 Vic. ch. 10, sec. 5, exempts Banking Corporations not merely from liability to the pecuniary penalty imposed by Con. Stat. C. ch. 58, sec. 9, but from the loss or forfeiture under that Statute of the security received by them for the moneys advanced.

Appeal from the judgment of the Court of Common Pleas, reported *ante*, p. 214.

C. Robinson, Q. C., and J. T. Anderson, for the appeal, cited 22 Vic. ch. 85; Con. Stat. C. ch. 58, sec 9; 16 Vic. ch. 80, sec. 3; *Imperial Dictionary*, "Forfeiture"; *Pye v. Butterfield*, 34 L. J. Q. B., 17.

J. H. Cameron, Q. C., contra, cited *Dwarr*. 632-636, 560-565; *Stimson v. Kerby*, 7 Grant, 510; *Kaines, v. Stacey*, 9 C. P., 355 (a).

DRAPER, C. J. (15th March, 1867.)—The rule established by Consolidated Statute Canada, ch. 58, sec. 4, is, that no Bank may stipulate for, take, reserve, or exact a higher rate of discount or interest than seven per cent. per annum; and section 9 enacted that, subject to certain exceptions not applicable to this case, all bonds, bills, promissory notes, contracts and assurances whatever, made or executed in contravention of this act, whereupon or whereby a greater interest is reserved and taken than authorized by this act, or some other act or law, shall be *utterly void*, and every Bank or Banking institution, and every Corporation or Company, and association of persons (not being a Bank authorized to lend or borrow money as aforesaid), which directly or indirectly takes, accepts and receives a higher rate of interest, shall *forfeit* and *lose* for every such offence treble the value of the moneys, wares, merchandize or other commodities lent or bargained for, to be recovered by action of debt in any Court of competent jurisdiction, &c.

By the 5th section of 29 and 30 Vic. ch. 10, no Bank shall, after the passing of this act, be liable to any penalty or forfeiture for usury under the 9th section of chapter 58, above set out, but the amount of interest or commission which such Bank can receive shall remain as limited by that statute.

The arguments have mainly proceeded upon the meaning of the word "forfeiture" in the latter act. The appellants' counsel contend that it does not apply to that part of section 9, ch. 58, which makes utterly void all bonds, bills, &c., whereupon or whereby a greater interest is reserved and taken than that statute authorizes. The respondent's counsel urge the contrary and insist that by declaring that Banks

(a) Argued 28th January, 1867, before Draper, C. J., VanKoughnet, C., Richards, C. J., Hagarty, J., A. Wilson, J., J. Wilson, J., Mowatt, V. C.

should not hereafter be liable to any penalty or forfeiture for usury, the Legislature have virtually repealed that utterly avoiding provision, because such avoiding is a forfeiture inflicted upon the Bank so offending.

But if the amount of discount, or commission, or interest, which Banks may take or receive, is still left subject to the limitations expressed in the former act, this section 5 of the latter act treats the disregard of such limitations as "usury," and apparently affirms the prior law that such usury was an offence, at least to the extent that it subjects those committing it to a penalty and forfeiture. To say that after a named day a Bank shall not be liable to any penalty or forfeiture is different from saying that after that day there shall be in law no such offence as usury. Now, the Legislature have said the one: they have not said the other, at least in direct terms, and, considering both statutes, it seems to me they did not intend to say so.

The prohibition by Act of Parliament to do a certain thing, *ex. gr.* to "take, reserve or exact" a higher rate of interest than seven per cent., would *per se* make the breach of that prohibition an offence. The prohibition loses no force by affixing to the breach of it the name of usury; for conceding that usury originally meant any reward taken for the use of money, it has long ago acquired the signification of the taking an interest greater than that permitted by law. Such an act is ranked by Blackstone among the offences against public trade (4 Com. 156, and see 2 Com. 456.) It was an offence at common law, not a new offence created by statute (3 Inst. 151.)

It was a general principle that, where a statute prohibits a matter of public grievance, any act contrary to such prohibition is a misdemeanour, and this, *a fortiori*, if the act be coupled with a corrupt motive; and the law is the same, although the statute inflicts a particular penalty for the offence. Much of what is said by Lord Mansfield in *R. v. Robinson* (2 Burr. 804) bears on this point. *R. v. Harris* (4 T. R. 202), is clear to that effect, and *R. v. Sainsbury* (4 T. R. 457) *per* Ashurst, J. In 2 *Chit. Crim. Law* 548,

there is a precedent for an indictment for usury, and in the notes thereto reference is made to other precedents. Such mode of prosecuting for the offence was seldom adopted, for the obvious reason that the statute gave such heavy penalties to the informer that he preferred suing for them to proceeding by indictment where the prosecutor recovered nothing.

I have fallen into what I fear may be deemed the pedantry of these observations by a consideration of the somewhat narrow line of argument taken at the bar on behalf of the respondents. It was, among other things, suggested, that in the 16 Vic. ch. 70, a statute passed to modify the usury laws, and enacting that no contract to be thenceforward made for the loan and forbearance at any rate of interest whatever, and no payment in pursuance of such contract, shall make any party to such contract or payment liable to any loss, forfeiture or penalty, or proceeding civil or criminal for usury, loss is put on the same footing as forfeiture, and that taking the last statute as *in pari materia*, when the Legislature said (what they especially excluded from the 16th Vic.) that no Bank should be liable to any forfeiture or penalty for usury, they meant to include loss also, and that even if the word forfeiture in its strict sense would scarcely include the deprivation of a right to sue upon certain assurances upon or in connection with which prohibited discount or interest had been taken, yet this was a remedial statute and its construction should be extended by equity. I have not yet satisfied myself that this statute belongs to the class to which that doctrine of extension properly applies.

The judgment appealed from appears, also, to rest principally on the construction and application of the word "forfeiture."

In common acceptation there is little difference made between penalty and forfeiture. In legal construction penalties are of three classes, *Pæna pecuniaria*, *Pæna Corporalis*, *Pæna Exilii* (*Hussey v. Moore*, per Doderidge, J., Cro. Jac. 415.) Forfeiture is more strictly applicable to

that loss or deprivation of property which results from some offence or unlawful act of omission or commission, the offender losing property and his title to it, which is transferred to another, as in treason, &c., or by making a conveyance to an alien, whereby on office found the Crown became entitled, or by breaches of covenant, and by various other modes. The word, in these and similar cases, seems to import a loss by the one party of his right, title and interest, in some property, which thereupon vests in and becomes the property of another. An enactment by which a certain class of assurances is made wholly void, or void as against certain parties, creditors for instance, or in the hands of parties to the act which causes the avoidance, does not create such a forfeiture, though it inflicts a loss. By earlier, now repealed, statutes against usury, bills, &c., given upon usurious consideration, were utterly void, even in the hands of a *bona fide* holder for value, without notice. The term forfeiture or penalty could scarcely apply to such a case, however strong was the equitable claim of such holder to relief from loss. The word certainly has a larger significance in many Acts of Parliament, wherever it is declared that, under specified circumstances, a party shall forfeit and pay, but the context establishes the sense, and the word is used in the sense of penalty.

I cannot help thinking the argument for the respondents proves too much. It asserts that the words "no Bank shall be liable to any penalty or forfeiture for usury," operate to repeal the prior enactment that all bonds, bills, promissory notes, &c., &c., made contrary to the law then in force, shall be utterly void, as well as that which follows, that every Bank, &c., which directly or indirectly takes, &c., a higher rate of interest than that which that statute permits, "*shall forfeit and lose*" for every such offence treble the value, &c. Neither the arguments of counsel nor the judgment of the Court go the length of suggesting that the Legislature either intended, or have without intention virtually repealed the restriction imposed on the Banks, to take or receive more than seven per cent. by way of discount or interest.

But if the argument be sound, it appears to me to involve the conclusion that this restriction is virtually superseded, that it is repealed by implication, though certainly not by direct and plain words. The language only involves any penalty or forfeiture : the construction gives to the Bank a new power ; a power unequivocally given in the former act to individuals, but as unequivocally withheld from these moneyed corporations. With their previous plain enactments before them, I find it difficult to conceive that if it was the intention of the Legislature to place both Banks and individuals on the same footing in all respects, they would use phraseology so capable of two interpretations, more resembling (if the judgment rightly construes it) the studied ambiguity of the Delphic Pythoness, than the fitting perspicuity of a well drawn enactment. The opponents of such a change as the construction given puts upon it, might have voted for the enactment in full faith that it would leave the existing law unaltered, except as to what they understood as penalties and forfeitures.

It may, however, be denied that the judgment in its proper effect goes so far.

We all agree that the act takes away liabilities to forfeitures and penalties, whatever those forfeitures mean. The judgment decides that they include so much of the prior act as made utterly void every security taken upon a contract, whereupon or whereby a greater rate of discount or interest is reserved and taken than seven per cent. The Banks may then, unchecked by consequences, take whatever they please to "exact" in that shape from the necessities of those dealing with them. The law limits them to seven per cent. ; but there is no penalty or forfeiture for taking more, and the securities given upon the contract entered into contrary to the law are valid, except perhaps when the Banks attempted to recover upon them more than the law permits. The provision that they shall not *stipulate for* more than seven per cent. is entirely annulled : the remaining provisions for the same purpose are a dead letter, though they all remain on the statute book ; for if they are disregarded, what is the remedy ? I presume it cannot be by indictment, when they

are not liable to any penalty or forfeiture for usury ; nor, according to the judgment, is it by avoiding the securities. If, as the judgment appears to assume, the difficulties the Banks would encounter in endeavouring to recover back money advanced upon a security which the statute has made void, amount to a denial of a remedy — (see *Goodall v. Lowndes*, 6 Q. B. 464)—I think the customer who had paid an excess over the statutory rate of discount or interest, would experience equal difficulties in getting it back, and might anticipate further consequences, which would induce him not to make the attempt. The restriction, I repeat, becomes a dead letter as a protection to public trade and its interests, to protect which it was evidently imposed. The Legislature thought it wise to impose it: they must have thought it wise to continue it, or they could by a few words have repealed it, when they abrogated the penalties and forfeitures. But if, as is obvious, they intended the restriction to remain, for what conceivable reason could they design to repeal the only remaining provision which afforded any security for its being observed? I am fortified in my conviction, that, by giving relief against penalties and forfeitures, the provision for making void the securities was untouched, by the consideration that penalties for usury might (as the law formerly stood) be incurred, while the assurance given was legal, and that the assurance might be void while the party to it incurred no penalty. (See note 1 to *Ferrall v. Sharon*, 1 Wms. Saund. 295.)

If I felt quite sure that I knew what mischief the 5th section of 29 Vic. was intended to remove, I could better judge how far the remedy was designed to extend. The context affords no help in answering this enquiry, for it neither refers to usury, nor the liability of Banks to penalty or forfeiture for usury, and the section has no apparent relation to the other provisions of the act to provide for the issue of Provincial notes, in which it is found. It is only by reference to the existing law relative to the rate of interest that any assistance can be got. It may have been thought unnecessary any longer to continue the penalty or

forfeiture of three times the amount of the money lent or bargained for, when there was no longer any restriction on the rate of interest, except in regard to Banks. It may have been considered unnecessary for public interests to subject Banks to *qui tam* actions for usury, because the assumed standing and character of the managing parties of these corporations gave assurance that they would not wilfully violate the law, and that if they did, then making void the securities tainted with the offence was a sufficient check. If this assumption of the object and intention of the Legislature is well founded, the construction I give to the statute affirms and effectuates it. I feel no doubt that I fully comply with the letter of the act, and I cannot think that I fall short of its spirit or inner meaning. I feel bound to avoid a construction which, in my humble judgment, would open the door to a mischief at least equal to any which it actually removes; which would operate as a protection and immunity to hard and oppressive exactions by Banking Corporations upon their embarrassed debtors; and which would, as appears to me, create the singular anomaly of an act being positively prohibited by law, and yet not being punishable by any sort of loss, penalty or forfeiture.

I think the judgment should be reversed, and be given for the defendants in the Court below.

VANKOUGHNET, C., concurred with DRAPER, C. J.

RICHARDS, C. J., adhered to the opinion expressed by the Court below.

HAGARTY, J.—I do not see how we can give reasonable effect to the Act of last Session, except by adopting the view of the Court below.

When the relieving clause was passed such a note as this was void, and a forfeiture of treble the value was imposed for the offence of taking a higher rate of interest. Then the act declares that no Bank shall be liable to any penalty or forfeiture for usury under the 9th section of Consol. Stat., but the amount of interest or commission which such Bank

can receive shall remain as limited by the prior law. If the Legislature intended to leave the note void, I do not see why they should add the words just quoted, limiting the rate of interest and commission. If a Bank discount a note and then by law is disabled from recovering on it, as an invalid contract, it forfeits, I think, its right of action and its claim on the parties : this is on account of usury.

I think any statute declaring that a Bank shall not be liable to any penalty or forfeiture for usury, necessarily relieves it from the loss or forfeiture of its right of action or moneys advanced.

The 9th section declares all notes, &c., void, on which usurious interest is reserved and taken, and then proceeds to enact that a Bank which takes a higher rate of interest shall *forfeit and lose* for every such offence treble the value of the moneys, &c., lent or bargained for, to be recovered by action, &c.

In explaining this section in anything like popular phraseology, it would be said that in the case of a usurious contract the Bank would forfeit the security it had taken and the moneys it had advanced, and also forfeit treble the amount, to be recovered by action.

The Act of last Session says, "No Bank shall be liable to any penalty or forfeiture for usury under the 9th section."

By the 9th section the Bank certainly *forfeited* the money it had advanced and also its right of action for its recovery. Can it be relieved of "any forfeiture" if we declare it still liable to forfeiture or loss of its legal right to its moneys advanced? Does it not both in legal and popular phrase *forfeit* its moneys and its security, by the usury forbidden by the prior statute? The best English etymological dictionary (Richardson's) defines the word "Forfeit" from the French "*fors*," "out of," "*faire*," "to do, or cause to be out of," away from, and consequently "*transgredi*," to transgress or do amiss, misdo, and also "*rem suam amittere*," (*sc. ex delicto*) to do away or lose his property (*sc. for some crime*). "To do away or lose, to do or put away a property or right, to alienate or lose (by misdeed or transgression)."

The word is wide enough in its signification to embrace every loss sustained under the 9th section by the commission of usury.

When it is declared that a man for any breach of the law shall be disabled from enforcing any otherwise legal right, I think, he may both in legal and popular phrase be said to have "forfeited" such right, although in our narrow sense a forfeiture is where the thing or right lost passes to or vests in another.

If the security remains till avoided for the usury, then why did the relieving clause go on to limit the amount of interest or commission?

On the narrower construction the clause might read that no Bank should be liable to any penalty or forfeiture for usury under the 9th section, the security, however, remaining avoided; but the amount of interest or commission which such Bank can receive shall remain as limited by the said chapter.

Interest or commission on what? Hardly on the avoided security or contract. If the intention were merely to relieve from the forfeiture of the treble value, leaving the securities avoided, it was wholly unnecessary to insert this clause as to interest and commission. Its presence in the context is only explicable, in my mind, on the supposition that the Legislature meant to say and have said in effect, "We relieve you from all forfeitures and losses and disabilities which the 9th section imposed upon you. You may still enforce your contracts, *but* (and the word is most significant) we leave one prohibition on you, the amount of interest and commission you receive must remain as limited by the statute."

Section 9 may be thus stated: No corporation, &c., not being a Bank shall take more than six per cent. All bonds, bills, notes, &c., made in contravention of the Act shall be utterly void. Every Bank, corporation and company not being a Bank, &c., taking the higher rate, shall forfeit and lose treble the value, &c.

The 5th section relieves the Bank alone from any penalty or forfeiture for usury under the 9th section.

I am aware of the difficulties suggested by my construction; amongst others, that, while Banks are relieved from having their securities avoided, loan companies and associations, which are not Banks, are left unrelieved and still liable to the treble value.

I cannot explain this beyond pointing out that the Legislature had already made a special difference between them, allowing Banks to take seven per cent., while the others were restricted to six.

It is also suggested that the prohibition in section 5, limiting the amount of interest and commission taken by a Bank, will be of little if any avail.

Perhaps, the difficulty (if not provided for by the ordinary law) may be much lessened by the language of the Interpretation Act (Consol. Can. ch. 5, sec. 6, sub-sec. 15): "Any wilful contravention of any such Act as aforesaid, which is not made an offence of some other kind, shall be a misdemeanor and punishable accordingly."

A. WILSON, J.—The excess of money may be recovered back on an usurious loan: *Smith v. Bromley* (2 Dougl. 695); for the parties in such a case do not stand *in pari delicto*: *Browning v. Morris* (Cowp. 790), *Williams v. Headley* (8 East 378). Com. Dig. "Action upon statute" (F.) it is said, "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law:" *Couch v. Steel* (3 E. & B. 402).

The Queen v. Buchanan (8 Q. B. 883).—The statute 6 and 7 Vic., ch. 73, s. 2,* prohibited persons from acting as attorneys in any Court, unless previously admitted, enrolled and otherwise duly qualified. Sections 35 and 36 prohibited persons so acting contrary to the statute from recovering their fees, and made such offence a contempt of Court: *Held*, an unqualified person so acting as an attorney might be indicted under the substantive prohibitory clause (s. 2) for a misdemeanor, and that secs. 35 and 36 did not limit the

punishment for the offence to the particular incapacity and punishment there specified.

Lord *Denman*, C. J., said, "I am of opinion that whenever a person does an act which a statute on public grounds has prohibited generally, he is liable to an indictment."

The provision in the Act of Canada, ch. 58, sec. 4, that no Bank may stipulate to take, receive or grant a higher rate of discount or interest than seven per centum per annum, is a prohibition, which, if infringed, I think, an indictment would lie against the Bank for the violation of, although they are no longer liable for any penalty or forfeiture for usury under the 9th sec. of c. 58.

As there is both a civil and a criminal remedy against Banks, which take more than the allowable rate of interest, notwithstanding their relief from the special penalties under c. 58, there is no power in them to take whatever sum they please without the accompanying responsibility for their illegal conduct.

I think the Statute was correctly interpreted in the Court below, and that the appeal should be dismissed.

J. WILSON, J., adhered to the opinion expressed by the Court below.

MOWAT, V. C., concurred with DRAPER, C. J., being of opinion that the judgment of the Court below should be reversed.

Appeal dismissed, with costs.

HENRY PETTIGREW (Plaintiff below) *Appellant*, v. EDMUND DOYLE, (Defendant below) *Respondent*.

Ejectment—Notice of title—Practice.

Held, affirming the judgment of the Court of Common Pleas, *ante* p. 34, Draper, C. J., VanKoughnet, C., and Hagarty, J., *dissentientibus*, that a plaintiff in ejectment, having by his notice claimed under his paper title, could not, in answer to a lease of the premises from him to defendant, set up by the latter, rely upon a forfeiture of such lease by reason of condition broken, but that, to entitle him to take advantage of such forfeiture, he should have alleged it in his notice.

Appeal from the judgment of the Court of Common Pleas, reported at page 34 of this volume, where the facts of the case are fully stated.

D. McCarthy, for the appellant, besides the authorities before referred to, cited *Roberts v. Davy*, 4 B. & A. 664; C. S. U. C. ch. 27 s. 4; *Warrall v. Clare*, 2 Camp. 629; *Co. Litt.* 304; *Com. Dig.* "Pleader;" *McGee v. McLachlin*, 23 Q. B. p. 90; *Berkley v. Hardy*, 5 B. & C. 355; *Parker v. Hunter*, 7 M. & W. 322; *Smith's L. & T.* 142; *Jones v. Carter*, 15 M. & W. 724.

Robert A. Harrison, contra, cited *Hudson v. Revett*, 5 Bing. 368; *Richardson v. Langridge*, 4 Taun. 128; *Hibblewhite v. McMorine*, 6 M. & W. 200; *Doidge v. Bowers*, 2 M. & W. 365; *Braythwate v. Hitchcock*, 10 M. & W. 494; *Hogan v. Berry* 24 U. C. 346; *Doe Lloyd v. Ingleby*, 15 M. & W. 469, *per* Platt, B.; *Doe Wyndham v. Carew*, 2 Q. B. 317; *Doe Darke v. Bowditch*, 8 Q. B. 973; *Arnsby v. Woodward*, 6 B. & C. 519; *Symond v. Lawnd*, Cro. Eliz. 239; *Till. Adams' Eject.* 160; *Long v. Bilkes*, 1 M. & G. 87; *Jones v. Carter*, 15 M. & W. 718; *Franklin v. Carter*, 1 C. B. 750; C. S. U. C. ch. 27, s. 5; *Colby v. Wall*, 12 C. P. 95; *Orser v. Vernon*, 14 C. P. 573; *Field v. Livingstone*, 17 C. P. 26; *Kenney v. Shaughnessey*, 3 U. C. L. J. 29; *Doe Birch v. Phillipp*, 2 T. R.; *Doe Roberts v. Roe*, 23 L. J. Ex. 102 (a).

(a) Argued 30th Jan. 1867, before the same Judges as the preceding case.

DRAPER, C. J. (March 15, 1867)—I regret greatly that on a point so very technical I am compelled to differ from the Court of Common Pleas. It is well, however, that the practice should be finally settled.

A plaintiff in ejectment with his writ must serve a notice of the nature of the title on which he relies to obtain possession. This notice operates as an explanation as well as limitation of the words of the writ of summons, "to the possession whereof" (*i. e.* of the lands previously mentioned) "he claims to be entitled."

The party served with the writ, or any other party who has obtained permission, must enter an appearance in order to defend. This appearance puts in issue the plaintiff's title as stated in the notice, and if with the appearance there be no notice setting up an adverse title, nothing can be tried but the plaintiff's right to possession according to his notice. If that, being proved, gives a *prima facie* right to possession, he is entitled to a verdict.

The defendant, however, may, besides thus denying the plaintiff's title, set up title in himself, or in some other person under whom he claims, and, assuming that the plaintiff proves a sufficient *prima facie* case, the defendant must go into a proof of the title of which he has thus given notice, and, according to the sufficiency of his evidence, will or will not get a verdict affirming his title, and so defeating the action.

The plaintiff in this case gives notice that his title is a deed of bargain and sale from W., who derived title from the patentee of the Crown.

The defendant gives notice that his claim is under a lease from the plaintiff for a term not expired. At the trial he admitted the plaintiff's title, and undertook to shew that in spite of it he was entitled to retain possession, and he put in evidence an instrument, which, for the purposes of the present discussion, I assume to be a lease, dated 1st September, 1863, for seven years from date, containing various conditions to be performed by the defendant, otherwise the lease to be null and void. The plaintiff gave in evidence that

these conditions had been broken, to which the defendant objected that the plaintiff could not set up the forfeiture, because he had not relied upon it in his notice of title. This question, among others, was left to the jury, and they were told that if they found against defendant upon it, to give the plaintiff a verdict, and leave was reserved to defendant to move to enter a nonsuit on the objection. The jury found the conditions had been broken. A nonsuit was moved for and was granted, on the ground that as the defendant had the estate vested in him by the lease and the plaintiff was seeking to divest it out of him, and as the burden of proof lay upon the plaintiff, he should have set out in his notice of title that he claimed possession by reason of the breaches of condition on the part of the lessee, the defendant.

I have arrived at a contrary conclusion. The plaintiff must be taken to have known what the jury found to be the fact, that the conditions or covenants in the lease were broken by the defendant, and that, in the words of the indenture, it had thereby become "null and void."

To hold that he is driven to rely on the forfeiture, as forming his right to the possession, is to hold that he must either obtain leave to set up title in two modes (under sec. 5 of the ejectment act), or that he must abandon a ground on which he rested at the trial, namely, that the alleged lease was not his deed on the facts appearing. And he must have admitted the lease as binding on himself, and have assumed the burden of proving it to be binding on the defendant, and an estoppel upon him to deny the plaintiff's title, and then have gone on to prove that it had become null and void. That proof would clearly shew that the defendant had no right to keep the plaintiff out of possession, but, in order to lay the foundation for giving it, the plaintiff must put in evidence and prove the very title which is set out in the defendant's notice, as his ground for resisting the plaintiff's action.

It appears to me more reasonable to say that the plaintiff, knowing the lease was annulled, might rest his claim to possession on the title which enabled him to give the lease, and

out of which title he had carved the term, thus, by the defendant's breach of condition, brought to an end. The defendant knew better than any one what were the facts on which the plaintiff must have relied to make the indenture of lease a nullity.

I take the result to be, that the plaintiff, being seised in fee, parted with the right of possession for seven years, subject to the sooner determination of that term by certain acts or omissions on the part of the defendant. The defendant did so conduct himself as to render void his lease, and thus the plaintiff was restored to his position as it was before he made it.

While there was no breach of condition, and during the term, the plaintiff had no right of possession, his lease displacing the right, but, on proof of such breach, the lease was displaced and the term came to an end. The plaintiff's act and deed is set up by the defendant as his right to hold possession: it is surely no more than answering this right to set up the defendant's own act which has destroyed it. It is an answer to the defence, not an assertion of an independent title giving the right to recover. I cannot agree that the plaintiff is prevented from recovering by not stating it in his notice of title.

VANKOUGHNET, C., concurred with DRAPER, C. J.

RICHARDS, C. J.—I have but little to add to what has been said in the Court below.

If the notice referred to in the fourth section of the Ejectment Act is to be of any use practically, it seems to me, it ought to inform the defendant what title the plaintiff intends to set up and what claim he, the defendant, is to meet at the trial.

I admit, as a legal proposition, that after the landlord has entered upon demised premises for a breach of a condition of the lease, its legal effect on the landlord's estate may be the same as if the lease had not existed, and he may then be said to be in of his original right. The same reasoning

applies equally to an entry after the expiration of the lease. But, when a landlord asserts that the lease is forfeited, he is obliged to show that on the trial, if that mode of claim is set up by him. This surely is the fairest mode of proceeding, for then both parties know what they are going down to *Nisi Prius* to try. It is alleged, however, that the defendant well knows if he has been guilty of any breach of his covenant, and knowing this he ought to come prepared to shew that his lease is a valid lease. Circumstances, however, may arise where the plaintiff contends that the instrument set up by the defendant as a lease is void, or is not his deed, and the defendant may go down to trial to contest that point, and if the question of forfeiture is allowed to be raised on him suddenly, much injustice may be done. He may not come there to contest such a case. He may not be fully prepared to meet that issue, but quite prepared as to the other. From what occurred at the argument, I believe such to be the fact in this case.

Now, what would be the proper course to pursue at *Nisi Prius* on notices similar to these? If the effect of the defendant's notice was not to admit the plaintiff's title, the plaintiff would prove a *primâ facie* case. The defendant then would prove his lease. That would answer the plaintiff's *primâ facie* case. The plaintiff would then be bound to prove what in most cases is the real contest between the parties, whether the conditions of the lease had been forfeited so as to allow the plaintiff to enter for such forfeiture. This seems the plain reasonable view to take; that the title on which the plaintiff claims to eject his tenant is, that having entered as his tenant on the land, and become seised of a term of years therein, which had not expired by lapse of time, the defendant had forfeited such term, because he had broken the condition on which he held it. The technical view contended for can no doubt be sustained by arguments that can be made to apply, but surely that view which is the plainest, simplest, gives what the Legislature seemed to consider necessary in the most ample manner, is that which we ought to carry out when it can be done without the violation

of any technical rule. It cannot be doubted that if the plaintiff had stated, in his notice of claim, that he was proceeding against the defendant for breach of the condition of the lease which he held from him, that this would have limited the plaintiff to that one ground of claim, and he would then have been bound to shew the forfeiture of the lease ; whereas, under the view now contended for by him, he may contest the fact of the defendant ever having had a lease, and also claim that he has forfeited it ; virtually, in fact, setting up title in two modes, which the statute expressly forbids.

As at present advised, I think the view taken in the Court below the one best calculated to bring about such a practice in ejectment as will shew in the least inconvenient manner what the real point in contest between the parties is, and in that way carry out what I believe was the intention of the Legislature ; and in a proceeding where a forfeiture is claimed, I do not think the Courts should go out of their way to favour parties who wish to set up such a right, without giving proper notice of their intent to do so to their opponents.

HAGARTY, J.—I have always been of opinion that the proper construction of sec. 4 of our Ejectment Act can only be that the claimant shall state in his notice the title just as he has to prove it at *Nisi Prius*, neither more or less. Whatever will establish a *prima facie* title on which he may close his case, should, I think, be stated in his notice, and that the notice may always be framed with that view. I do not consider he is bound to anticipate any defence which defendant may set up, whether it be by title paramount, or by title derived from plaintiff.

I think an irregular practice has grown up of stating in the notices one link only in a chain of title to be proved ; *e. g.*, “I claim the lands by deed from John Brown.” Now, if plaintiff proved John Brown in possession and a conveyance from him, this would be a *prima facie* case, on which he might rest at *Nisi Prius* ; but if, as is

generally the case, the deed from John Brown is only the first of a chain of conveyances up to the Crown, or to some person in possession, then, I think, the notice insufficient under this act. I think the defendant is entitled to know beforehand the whole chain of title on which plaintiff is to rest his *primâ facie* case, and no more and no less.

When a plaintiff is aware that defendant is or was his tenant, he may rest his case on proof of defendant's entry under him, and then he must go on to prove how defendant's right of possession is at an end, and his right perfected. If he intended so to open and rest his case at *Nisi Prius*, I think he is clearly bound so to state it in his notice, viz., the entry under him by lease, &c., and the forfeiture on which he relies to shew his right.

But it is, I think, beyond controversy that at *Nisi Prius* the landlord may simply put in his patent or other paper title, and there rest his case. Defendant must then, if he rely on a lease from plaintiff, prove such lease, and plaintiff may go into evidence in reply to shew forfeiture, &c.

In such a case, I am of opinion that plaintiff's notice satisfies the statute by merely stating the *primâ facie* title on which he intends to rest and did rest his case at the trial. A plaintiff at all doubtful of his ability to prove his paper title may, and often does, prefer to rely on defendant's entry under him and subsequent default, and so states his claim in his notice; or he could, on a proper statement of reasons, obtain a Judge's order to set up both lines of title in his notice. In the case before us, where plaintiff relied both on the alleged defect in the execution of the lease, as well as the forfeiture, he might well have asked for and obtained such leave; but I am of opinion that it is sufficient to state in the notice any title on which at *Nisi Prius* plaintiff makes out a *primâ facie* case calling for a defence.

I think the appeal should be allowed.

A. WILSON, J.—The question at the trial in ejectment is, whether the statement in the writ of the title of the claimant is true or false, and if true, then which of the claimants is

titled, and whether to the whole or part, and if to part, then to which part of the property in question.

The notice of the nature of the title intended to be set up by the claimant is required to be attached to the writ, and to be served on the person in possession, and to state the nature of the claimant's title with reasonable certainty, and the Court is to exercise such jurisdiction over the proceeding "as to ensure a trial of the title."

If the lessor who claims to recover for a breach of condition contained in the lease, which creates a forfeiture and gives him his right of entry, is not obliged to rely upon the forfeiture as his right of action, but may rely upon his prior title, it is most likely he will be setting out a claim which he had no idea would be questioned, and which the tenant had no idea of denying, while he is concealing his actual and undoubted cause of action. There is no difficulty in such a case in the jury determining whether *the statement in the writ* of the title of the claimant is true or false; but this is not the way to ensure a trial of the title *between this landlord and his tenant*, which the Court is required to see done.

When a lease has been made, the landlord, by creating an estate in the land and transferring his title to the lessee, has divested himself of his possession to the land, while the lease lasts just as effectually as if he had made a conveyance of the land in fee. After the making of the lease he would be a trespasser, if during its continuance he entered upon the land, unless the entry were made by virtue of the conditions of the lease.

If the landlord claim the right to enter because of an alleged forfeiture of the term, the estate is not determined until that entry be made, or an action brought to recover the land. The mere right of forfeiture does not determine or divest the estate, for the landlord is not obliged to accept of or acquiesce in the forfeiture until he do something to shew his election, how he will treat it: his estate is still a continuing one. The bringing of an action of ejectment to recover the land no doubt shews that the landlord has elected to put an

end to the lease ; but it has not in fact been put an end to by the mere bringing of the action, for that is the very question which has to be tried by the jury, and to say that a trial of that title is satisfied by the statement in the writ, or notice that the claimant has a grant from the Crown, or a deed from John Stiles, is to defeat the whole scope and purpose of the Statute. If this be the rule, then a lease for 999 years, made some centuries ago, might, if such an anachronism can be permitted in this country, be defeated on a statement of title traced for centuries back too, of which the defendant knows nothing and cares nothing, when all the while the only question *for trial* is whether the tenant has within the last few months broken some condition which creates a forfeiture or not.

If the tenant were to bring an action of trespass for an assault against the landlord for removing him from the premises upon his entry for condition broken, the landlord would be obliged to justify, not under his original title, if he had one, but under the clause of the lease which gave him the right to enter : *Roberts v. Tayler* (1 C. B. 117).

If the action were for trespass to the close, the landlord might plead *liberum tenementum*, which would oblige the plaintiff to reply the lease and the landlord to rejoin the clause of entry, which brings this last case to the same conclusion as the former case, though by one stage later in pleading, the title relied upon being the same in both, and that title being under and by virtue of the clause contained in the lease.

It does not follow that the person on entering for condition broken is in possession of his former estate ; for if A. be seised in fee in right of his wife, and make a feoffment in fee, upon condition that the feoffee shall demise the land to the feoffor for his life ; A. dies ; the condition is broken ;— in this case, the heir of the husband shall enter for the condition broken ; but it is impossible for him to have the estate that the feoffor had at the time of the condition made, for he had but an estate in right of his wife, which by his death was dissolved ; and therefore when the heir hath

entered for the condition broken and defeated the feoffment, his estate doth vanish and presently the estate is vested in the wife : *Co. Litt.* 202 *a*.

Nor is it necessary that the one who enters should have any reversion in him; as, if A. be possessed of a term of years, and demise all his interest to B., subject to a right of entry on breach of condition, A. may enter for breach, though he have no reversion : *Doe d. Freeman v. Bateman* (2 B. & A. 168. A mere annuitant may have the right of entry : *Doe Biass v. Horsley* (1 A. & E. 766). Nor do entries for breach of condition always defeat the estate entered upon : the right of entry may be only until the arrears of rent or other sum of money be paid up, or until some particular act be done : *Co. Litt.* 202 *b*, 203 *a*.

The right of entry for condition in many cases cannot be assigned : *Philpot v. Hoare* (2 At. 219); and the late statute, permitting rights of entry to be conveyed, does not extend to the kind of entry which this is : *Hunt v. Bishop* (8 Exch. 675). So the condition cannot be apportioned by act of the parties; as, if one let three acres of land subject to a right of entry, and the lessor afterwards grant his reversion in two acres, the condition is gone : 1 Saund. 288 *d* and notes, *Co. Litt.* 214 *a*.

The right to enter for condition broken is spoken of in 1 Ventr. 248 as "a special title," and in *Johns v. Whitley* (3 Wils 140) it is spoken of as a being in possession "by right of entry." There it was held that the lessor not having entered during the lease, which was one *pur autre vie*, for the condition broken, could not enter after the determination of that estate and take the emblements. The Court said, "The proviso would only operate during the continuance of the lease: when *that* was determined the proviso was gone, and the plaintiff having never been in possession *by right of re-entry* for the condition broken, should have no advantage thereof, and the defendant who ploughed and sowed the land has in law and justice a right to reap and take the emblements."

If therefore this right of re-entry be a title derivable from

the lease alone, not necessarily requiring any estate in the land whatever in the person, who has the right to enter, to support it, and if it cannot, except in some few cases, be assigned to another, either before or after default, and if it do not always defeat the estate entered upon, and must be specially relied on in pleading as a defence, it appears to me to follow conclusively that it is *a special title* in and by itself, and must under our Ejectment Act be relied upon by the landlord when he claims by that right to recover in the action. A title by "Forfeiture" is a mode of acquiring the title to land well known in the law, and is so treated in all our law books.

I incline, also, to think that if the tenant were the claimant in ejectment against his landlord, who had entered for failure of condition, and if the tenant claimed in his notice title by virtue of the lease, that the landlord could not simply traverse as it were the tenant's title by denying it, but that he would, resting on his condition broken, have to set up title in himself, by an assertion of entry for the condition broken. I do not see why he should not have, as it were, to plead this in ejectment against him as well as in trespass. The rule would be otherwise in England; for though our acts are very similar, they differ as to these notices of claim and title, which our statute has required as in some respects like pleadings.

I have had to consider this subject on several occasions, and I must say my opinion is not weakened by what I have heard since that time as to the correctness of the decision of the Court below on this point of practice, and I may add, also, that I believe it is the course of practice almost universally pursued by the profession.

It appears to me that the setting up, firstly, a denial of the lease in fact, and secondly, that it is forfeited by the default of condition, is in truth the setting up of two modes of title without the leave of a Judge to do so; and it is singular that in this case the plaintiff really depended upon the lease not being his deed, because executed by a person not his agent authorized by deed, and he had recourse to the

alleged forfeiture only because he had failed successfully to impeach the binding effect of the lease.

Such a course is in truth equivalent to a departure in pleading, as appears in *Com. Dig. "Pleader,"* (F. 7) Plow. 8, *Co. Litt.* 304 a ; *Warrall v. Clare* (2 Camp. 629).

I think the provisions of the Statute affording relief to tenants and mortgagors in default, who wish to pay up their arrears and save the forfeiture, cannot be so conveniently executed by permitting the general mode of claiming title which has been contended for. These provisions, too, shew most plainly that the estate of the tenant or mortgagor is not entirely gone by the default in performance of the condition, nor by the suit even at law.

I think the decision appealed from should be affirmed, and that the appeal should be dismissed.

J. WILSON, J.—The 4th section of the Act respecting Ejectment requires that to the writ shall be attached a notice of the nature of the title intended to be set up by the claimant, as for example, by grant from the Crown, or by deed, lease or other conveyance derived from or under the grantee of the Crown, &c., stating it with reasonable certainty.

The defendant, by the 8th section, may appear, and with the appearance shall file a notice addressed to the claimant, stating that, besides denying the title of the claimant, the party asserts title in himself, or in some other person under whom he claims, setting forth the mode in which such title is claimed, in like manner, to the same extent, and subject to the same conditions, rules and restrictions as are set forth in respect to the notice of a claimant's title.

By section 21, the claimants may proceed to trial in the same manner as in other actions ; and the particulars of the claim and defence and of the notice of claimant and defendant of their respective titles, if any, or copies thereof, shall be annexed to the record by the claimants, and, with certain exceptions, the question at the trial shall be, whether the statement in the writ of the title of the claimant is true or false, and if true, then which of the claimants is entitled,

and whether to the whole or part, and if to part, then to which part of the property in question.

The object of all legal procedure is the attainment of right, and with a view to this the Legislature and Courts have endeavoured to bring the parties to the real question in dispute by the shortest and most concise mode, by requiring each party to notify the other in some way of the claim set up and the defence intended.

By this act I have no doubt the Legislature intended that claimant and defendant should know what the claim and defence were. Did they know this? Here the claimant says, "I claim from Weir, who claims from Hopkins, the patentee of the Crown." The defendant says, "I claim under a lease from you." In this shape the action was brought down for trial. In this shape the question would be, lease or not. At the trial the real question was, whether the lease had been executed or not, and if executed, whether it had become forfeited by reason of the breach of the covenants contained in it.

Now, in my view of it, the claimant ought to have stated, as the fact was, that he claimed the land by reason of the breach of the lessee's covenants. Then he would have known what he was called upon to defend, and he might have got particulars of the specific breaches which worked the forfeiture. Reduce the proceeding to the form of a pleading, and the necessity of giving notice will appear very clearly. The claimant says, I claim the land, and I declare I am the grantee of Weir, the grantee of Hopkins, who was the patentee of the Crown. The defendant answers, I do not deny it, but you leased the land to me. The claimant replies, I do not admit I made the lease; but if I did, you broke its conditions and I am entitled to turn you out. The defendant rejoins, I deny this. Now, what are the questions to be tried, but lease or no lease, and if a lease, then whether or not it was forfeited? But the case was not carried down on these questions. The question of forfeiture, on which this trial is founded, was not spoken of till the trial, and

until then the defendant had no opportunity of knowing what he was to defend ; and so, I think, the defendant was entitled to have notice from the claimant of the footing upon which he claimed to have possession, by reason of the forfeiture of the lease, and therefore I concur in the judgment of the court below.

MOWAT, V. C., concurred in the judgment of the Court below, and considered that the appeal should be dismissed.

Appeal dismissed, with costs.

EASTER TERM, 30 VICTORIA, 1867.

Present :

HON. WILLIAM BUEL RICHARDS, C.J.

“ ADAM WILSON, J.

“ JOHN WILSON, J.

THE COMMERCIAL BANK OF CANADA V. BREGA.

Notary—Seal.

It is not necessary that the notary who protests a note should use an official seal, or subscribe himself *in writing* a notary public: any seal which he declares in the protest to be his official seal is sufficient, and the placing his signature before the *printed* words “notary public” amounts to an adoption of them.

Action against defendant as indorser of a promissory note for \$650 and interest.

Pleas—Want of presentment and notice of dishonour.

The cause was tried before the Chief Justice of this Court at the last County of York Assizes, held in Toronto.

The plaintiffs produced the protest of the note, in the usual form, signed by one Edward G. Malloch, opposite an ordinary, but not an *official* seal, as a notary, and with the printed words “notary public” written, under the seal.

The defendant’s counsel objected that the protest in question should have been under the *official* seal of the notary, that it afforded no evidence under the Statute of the presentment and notice of dishonour, and that plaintiffs ought to have proved that Malloch was at the time of the protest a notary.

The Chief Justice overruled the objection and a verdict was recorded in favour of the plaintiffs.

Robert A. Harrison now moved for a rule *nisi* to set aside the verdict and all subsequent proceedings for misdirection on the part of the learned Chief Justice in ruling as above mentioned, citing Consol. Stats. C. ch. 57, sec. 8, and Consol. Stats. U. C. ch. 42, sec. 21.

The Court refused the rule, holding that any seal which the notary in the protest designates as his official seal is sufficient under the Statute, and that there is no necessity for his *writing* the words "notary public" after his signature, as the placing his signature before the printed words amounts to an adoption of them.

WHITNEY V. WALL.

Written instrument—Parol evidence—New trial.

To an action on certain promissory notes and bills of exchange, and on the common counts, against defendant as jointly liable with one H., defendant pleaded satisfaction and discharge of plaintiff's claim before action, by executing with H. an assignment of the joint effects to plaintiff and another for the benefit of creditors, and that plaintiff accepted this in full satisfaction and discharge of the causes of action in question. At the trial parol testimony was admitted of the agreement to accept the assignment in satisfaction and discharge:

Held, that it had been properly received, the effect of it being not to vary the terms of the writing, but merely to prove a collateral fact.

Action on several promissory notes and bills of exchange, and on the common counts, against the defendant as liable jointly with one Hamilton.

The defendant pleaded that before action he satisfied and discharged the plaintiff's claim, by executing jointly with Hamilton an assignment of the property and effects of the firm of Hamilton & Wall to the plaintiff and one W. Hobb, the younger, upon trust for the benefit of the creditors of the said firm, and that the said firm delivered the assignment, and the plaintiff and Hobb accepted and received it, in full satisfaction and discharge of the defendant's liability in respect of the cause of action in the declaration mentioned.

The defendant, also, pleaded to the notes and bills of exchange, that while the plaintiff was the holder of them, he by express renunciation and waiver of the same exonerated and discharged the defendant from the payment of the same and from all liability thereon.

Issue.

The cause was tried at the last winter assizes for the County of York, before *Hagarty, J.*, when certain oral evidence was admitted to the effect stated in the head-note.

The learned Judge charged the jury that an agreement to give a future discharge on certain contingencies would not prove the plea, and as to the admission of the parol testimony outside of the deed, he directed the jury as in *Lindley v. Lacey*, 17 C. B. N. S. 578.

The jury found for the defendant.

In Hilary Term last, *G. Holmsted* obtained a rule *nisi* to set aside the verdict for a new trial, on the ground that the learned Judge improperly received parol evidence for the purpose of shewing that the deed of assignment was made on other considerations and conditions than those appearing on the face of the assignment. He also moved on the law and evidence.

M. C. Cameron, Q. C., shewed cause:—The parol testimony that the deed was taken in discharge may be admitted: *Davis v. Jones*, 17 C. B. 625; *Wallace v. Littell*, 11 C. B. N. S. 369. The case of *The Bank of Toronto v. Eccles*, 10 C. P. 282, 2 Err. & App. 53, shews that to support a deed a different consideration may be shewn than that which is expressed in it.

Holmsted, contra:—The evidence here given was to qualify or add to the written agreement, which cannot be done: *Losee v. Kezar*, 5 C. P. 234; *O'Neil v. Lingham*, 9 C. P. 14; *Story's Eq. Jur.* 152; *Wood v. Brett*, 9 Grant 452; *Re Browne*, 2 Grant, 590.

The evidence given did not in fact prove the plea: it proved at most a mere contingent engagement to grant a discharge at a future time, and it was, if it amounted to

anything, to give a release and not to take the deed in satisfaction: *Russell v. Russell*, 3 Lev. 189. The case of *Foster v. Dawber*, 6 Exch. 839, is relied on to prove the plea of exoneration.

A. WILSON, J., delivered the judgment of the Court.

We have no difficulty in holding the agreement (if one were made and proved), to accept the assignment in satisfaction and discharge, was rightly received in evidence, because the effect of it was not to vary in any manner the terms of the writing, but merely to prove a collateral fact, which might as well have been proved with respect to this instrument as to any other instrument or article whatever. It is probably not once in a thousand times where a writing, or a chattel accompanied with a writing, is delivered in satisfaction, that the writing expresses that such has been the condition on which the delivery was made. It may or may not have been given in satisfaction, and whether it was so or not will not control the legal effect of the instrument.

There is no reason why the defendant should not, after executing the deed, have said to the plaintiff, "I shall not deliver this deed to you unless you will give me a particular sum of money, or some other kind of property," and there would have been a perfectly good consideration moving from the defendant to have prevented such payment or delivery from being held to be a voluntary gift by the plaintiff. Or, if the plaintiff had promised on such a consideration to do either act, there is no reason why he could not have been made to perform it.

The evidence no doubt, if it amount to anything, shews, too, that the bargain was to grant a release or discharge rather than to accept the deed as a satisfaction; and the fact that the acquittance was to depend upon some future act, shews that the arrangement must have been of this nature, if there was an arrangement at all.

Perhaps a bargain to take an assignment and to grant a discharge, that is an immediate discharge, might be pleaded

as an accord and satisfaction, although the assignor might be entitled to a formal release, and might maintain an action for the refusal to grant it. We do not see anything against this effect being given to the bargain, if anything is proved. No doubt the assignment cannot be treated as if it contained a release; but it may be treated as the consideration for an accord and satisfaction, or for a release.

The difficulty we have is in saying there was any evidence to support either of the pleas. Sargisson says, and, as I understand his evidence, he means at the time when he and Crawford were negotiating with the defendant for the assignment, there was no understanding with the defendant about a discharge at all; and Crawford said that what was agreed upon was that a discharge would be given *if all was right*, and there is not a word of evidence from which it can be inferred that the plaintiff ever said it was all right, or that he would accept of the assignment and discharge the defendant; nor is there any conduct of his from which it can be inferred that he did take the assignment in satisfaction and discharge, or that he did exonerate the defendant from the notes and bills of exchange.

Such an agreement should have been clearly proved, when it might have been provided for in the assignment itself, and when the conduct of Crawford in giving the discharge to the defendant, and of the defendant in asking and in taking it, when he well knew Crawford was no longer in the plaintiff's employment, and had no longer the power to bind the plaintiff, was fairly calculated to create very serious suspicions against the claim which the defendant was putting forward contrary to the terms of the deed.

We think neither plea was proved in fact, and that a new trial should be granted.

Rule absolute for new trial, costs to abide event.

BURKE V. BATTLE.

Ejectment—Effect of appearance only—Devise to sell for payment of debts—Delegation of power.

In ejectment defendant simply entered an appearance to the action, without filing any notice of title: *Held*, that he could not at the trial set up a title in himself by possession, the effect of his appearance being merely to deny the title of the claimant, and this denial meaning that any answer might be made to it which did not assert title in defendant, or in any one under whom he claimed. In such a case the plaintiff must prove a strict title, and defendant may shew that this title has not been perfectly proved, or, being proved, he may shew a better title in some one else, but not in himself, or in any one under whom he claims.

A testator devised all his real and personal estate to his executors in fee in trust for sale to pay debts:

Held, on the authority of *Stronghill v. Ansley*, 16 Jur. 676, that a *bonâ fide* purchaser for value was not bound to enquire whether there were debts which authorized the executors to sell.

By a subsequent clause in his will the testator directed that all his real estate not specifically devised or required to pay debts should be sold by his executors as they thought best, and the moneys arising from the sale and from other sources should after payment of debts be invested by them: *Quære*, whether a mere power was created by this clause of the will, and if so, whether it was well executed by a delegated power; or whether, on a fair construction of the whole will, and to give effect to the general purpose which the testator had in view, a similar estate might not be deemed to be continued in the executors for the objects of the second as well as for those of the first clause.

EJECTMENT to recover lot number one in the eleventh concession of the township of Richmond, in the County of Lennox and Addington, containing 200 acres.

The plaintiff claimed title by deed from Michael Marrion and Catharine, his wife, to the plaintiff, dated the 16th of January, 1806.

The defendant limited his defence to that portion of the land which lay south of Lime Lake, together with about four acres enclosed and forming the south east corner of that part of the land lying north of Lime Lake and west of the travelled road running through the said land.

The cause was tried at the last spring assizes at Napanee, before *J. Wilson, J.*

The plaintiff put in the patent, tested 10th of June, 1836, granting the whole lot to Mary Dalyea in fee, a deed from John Grant and his wife Mary (formerly Mary Dalyea) to John Cartwright, dated 22nd April, 1837, in fee; an exem-

plification of probate of the will, published the 25th of November, 1844, of John S. Cartwright; a deed dated the 2nd September, 1862, from Sarah H. Cruikshank and others, executrix and executors, and devisees in trust, under the will of John S. Cartwright, to Michael Marrion, of the land in question, in fee; four powers of attorney dated respectively the 19th of August, 1861, the 20th of September, 1861, the 12th of February, 1862, and the 10th of March, 1862, from the devisees in trust separately to Richard J. Cartwright, and all of them of the same tenor; and a deed dated 5th of September, 1862, from Marrion and wife to the plaintiff.

After some further evidence given for the plaintiff a nonsuit was moved for, on the grounds,

1. There was no power in the will of J. S. Cartwright to sell this land.

2. The will authorized the sale of lands for debts, but no debt was shewn, and there was no authority to sell under the will except for debts.

3. Though there was a clause of the will which authorized the executors to sell land, if they made the deed, under this clause they had no right to delegate their power to others as they had done under the powers of Attorney produced.

The objections were over-ruled.

Defendant's counsel opened his case by stating that he claimed by possession, beside denying the plaintiff's right to, that part of the land south of the creek as well as the four acres north of it.

The counsel for the plaintiff objected that this was not open to the defendant.

The learned Judge made the following note of the case, "I suggest that if the paper title fail, then, as between the plaintiff and defendant, the question is whether Marrion or Battle was in possession of this land south of the road, and of how much."

The defence then proceeded, and witnesses were called in reply.

The learned Judge said, "I shall tell the jury to find for the plaintiff as to the whole lot on the paper title, and I shall ask them to say how much of the land south of the creek the defendant had possession of as against the plaintiff."

The jury found a verdict for the plaintiff on the paper title for the whole lot, and they found the plaintiff was in possession of all the land on both sides of the creek, except four acres on the north side and eight acres on the south side of the creek, which the defendant had in possession.

The further note of the case was as follows:—"It is agreed that if the defendant succeed in displacing the plaintiff's title, the Court may enter a verdict for the plaintiff as to the portions found for her, and for the defendant on the portions found for him: it is understood that this agreement is not to preclude the defendant from moving generally."

T. Moss obtained a rule to reduce the verdict, pursuant to leave reserved, to that portion of the premises which the jury found the plaintiff to have been in possession of before the defendant took possession, being the premises claimed, excepting the four acres north of Lime Lake Creek, and the eight acres south of Lime Lake Creek, as to which the jury found the defendant entitled by possession, and as to the last two described parcels, to enter a verdict for the defendant; or for a new trial, on the ground that the verdict was contrary to law and evidence.

Gwynne, Q. C., shewed cause:—

The question turns on the effect of the late John S. Cartwright's will, and whether the devisees in trust could delegate the trust under a power which this gave to another to execute for them. He referred to 1 *Sugd.* on Powers 6 ed. 128 et seq.; *Doe Hampton v. Shotter*, 8 A. & E. 905; *Moore v. Power*, 8 C. P. 109; *Mather v. Norton*, 16 Jur. 309; *Duff v. Mewburne*, 7 Grant 73; 2 *Sugd.*, V. & P. 11 ed. 836; *Sudg.* on Powers ch. 4, sec. 1 sub-sec. 31-34; *Hawker v. Hawker*, 3 B. & A. 537; *Moore v. Cleghorn*, 10 Beav. 423.

Moss contra:—

A mere power was created by the will and no estate whatever was granted: *Macdougall v. Macdonell*, 5 C. P. 353; *Hopkins v. Brown*, 10 U. C. 125; *Williams Executors* 5 ed. 849; *Combe's case*, 9 Co. 75b.

A. WILSON, J., delivered the judgment of the Court.

It appears to me the question was not open at the trial to the defendant to set up title in himself by possession, because he gave no notice of any such claim: he confined himself to a mere appearance to the portion to which he limited his defence, and the effect of that appearance was only to deny the title of the claimant.

This denial, I think, means that any answer may be made to it which does not assert title in the defendant, or in any one under whom he claims.

On a denial the plaintiff must prove a strict title to recover, and the defendant may shew the title relied on has not been perfectly proved, or, being proved, he may shew a better title by possession, or otherwise, in some one else, but not in himself, or in any one under whom it appears he claims. In such a case the Statute says he shall file a notice addressed to the claimant stating that, besides denying the title of the claimant, he "asserts title in himself, or in some other person (stating who) under whom he claims, and setting forth the mode in which such title is claimed, &c."; so that there is a plain distinction made by the Statute between a denial of title by the defendant and an affirmative setting up of title in himself, which gives to him a better title to the land than the plaintiff has shewn; and although there may be no difference between a possession or other title in a stranger, which defeats or denies the plaintiff's title, and a possession or other title in the defendant or in one under whom he claims, which does equally do so, for they each do no more than deny the plaintiff's title, yet, as the Statute has provided that a claim *by way of title* by the defendant shall be specially relied upon, we have nothing to do but to give effect to the enactment which requires it.

It appears, then, the defendant could do nothing more at

the trial than deny the plaintiff's title, and this he does do, or professes to do, by disputing the title made under the will, and the execution of that title under the power of attorney from the executrix and executors.

If these be sufficient in law to enable the plaintiff to recover as against the objections, he has proved his title against the defendant's denial: if they be not sufficient, the denial will prevail.

If the defendant had properly set up title in himself, it would not have been necessary to have considered the matters which were argued before us, because the jury found the possession to have been with the defendant for the only portion of the land in dispute.

The first question is, was there authority in the executrix and executors to sell the land under the will?

The parts of the will applicable to the point are the following: "It is my wish that all my debts and general expenses be paid as soon as possible after my decease; and as I have been involved for my friend J. B. F. who has executed to me a deed of certain property in the city of Montreal, it is my will and desire that the said property, *together with any other property, real as well as personal, which may be saleable in Canada*, (except such as is hereinafter specially devised), *be sold* to relieve my estate and to discharge all my debts and liabilities whatsoever, and for that purpose I give, devise, and bequeath to my executors hereinafter mentioned, and to either of them, so much of my property, real and personal, in whatever part of Canada situate, as may be sufficient (except as aforesaid) to satisfy and discharge all my just debts, to have and to hold the same to my said executors or either of them, their or either of their heirs and assigns for ever, in trust for the purposes aforesaid." "I also direct that all my real estate which I may now or hereafter have, not herein otherwise specially devised or required for the payment of my debts, be sold by my executors in such manner as they may think best in their discretion; and it is my will that the moneys arising from the collection of my debts and the sale of my real

estate as above mentioned shall, after payment of all the debts and expenses attending the trust, be invested by them in their names, &c., &c."

Under the first of these clauses the whole estate, real and personal, excepting that which is specifically devised, is given to the executors, and is placed under their absolute authority to dispose of as they please for the purpose of paying debts.

Upon the cases and according to the references cited, a *bonâ fide* purchaser for value is not bound to enquire whether there were debts or not which authorized the executors to sell: such a devise is "a declaration by the testator that he intended to trust the trustees with the receipt and application of the money and not to throw an obligation upon the purchaser at all,"—per Lord St. Leonards, L. C. in *Stronghill v. Ansley* (16 Jur. 676.)

This is quite sufficient for the disposal of the case; for though the executors had a further authority to sell under the second clause above referred to, and even although that clause may confer a simple power only, the *bonâ fide* purchaser, as the plaintiff certainly is, is fully protected by the first general clause, whether it stand alone or is accompanied with the latter clause.

It is, therefore, not necessary to determine whether the second clause creates a power merely or not, and if a power, whether it was well executed by a delegated power. It may be difficult, perhaps, to maintain that it gives a power only, when the first clause which covers all these lands confers an express estate on the executors in fee simple. It is true it is *for the purpose of paying debts* this estate is given by that clause, but on a fair construction of the whole will, and to give effect to the general purposes which the testator had in view, it may be that the like estate might be deemed to be continued in the executors for the objects of the second clause as well as for those of the first: see *Mather v. Norton*, (16 Jur. 309.)

We give no opinion on this part of the case, as none is called for.

The rule will be discharged.

Rule discharged.

BEATTY V. BEATTY.

Dower—Seisin—Marriage—Evidence.

In an action of dower the evidence of seisin was the defendant's declaration to a third party that the husband was to convey the land in question to him, and his subsequent declaration that he had conveyed to him in fee, together with a memorial of this conveyance executed by the defendant. There was also the fact that the husband had been off and on the land before the conveyance: *Held*, sufficient.

General reputation is *primâ facie* evidence of marriage in an action of dower.

In this case, irrespective of general reputation, there was evidence that the defendant had told a third party he was to give the demandant's husband (his brother) \$100 to bring out his wife and children from Scotland, who was to execute to him in return a deed of the land in question. Defendant afterwards said he had received the deed and that the wife would bar her dower on her arrival in this country. On her arrival defendant received her into his house as his brother's wife, and recognized her as such until his brother's death: *Held*, good *primâ facie* evidence of marriage.

Semble, that the recognition by defendant of demandant as his brother's wife would of itself alone have been sufficient *primâ facie* evidence of their marriage as against him in this action.

THIS was an action to recover dower in the east half of lot 12, in the ninth concession of the township of Essa. Pleas, *ne unques seisie ; ne unques accouple*.

The cause was tried at the Spring Assizes for Simcoe, before *Hagarty, J.*

The evidence of William Young was, that five or six years after the rebellion the defendant told him he was going to give \$100 to bring John's wife and children out from Scotland where they then were, and for this John was to give him a deed of fifty acres of the south half of the east half of lot 12, in the ninth concession of Essa. John's wife and children came out, and she lived with him, and they lived as man and wife. They first went to defendant's house, as John had not his house ready. Defendant told Young afterwards, that is after the first conversation, he had got his title from John to this fifty acres of land, a deed in fee, and his wife would sign it when she came out. John had been back and forward to this lot before he heard of his making the deed to defendant.

Charles McGee knew John Beatty and his wife slightly.

She was treated as John's wife in the neighborhood, and so considered. John died six or seven years ago.

Daniel Casper knew John : he died in 1860. He knew him and the demandant eight years before that time : they lived as man and wife till his death.

William Pringle first knew demandant in 1848. Sailed with her from Liverpool to this country. When she reached Toronto John met her there, and received her as his wife. She was known as Mrs. Beatty. She had grown-up children with her. He understood John had been a number of years here before she came out.

A memorial was produced of a deed from John Beatty to defendant, dated 9th of June, 1847, of the south east quarter of lot 12, in the ninth concession of 'Essa, in fee, purporting to have been signed by Robert Beatty. McKiltie, one of the subscribing witnesses, was called, and he said he saw this memorial signed by the defendant. Lloyd, the other witness, said it was executed by the defendant.

This was the plaintiff's case.

The defendant's counsel had leave reserved to him to move to enter a non-suit on the grounds hereinafter mentioned, and the case proceeded.

The defence did not displace the demandant's case. It shewed that John had been jested with about being a bachelor, and had been taken for an unmarried man till his wife came out, when he passed her as his wife.

Verdict for demandant.

In Easter Term, *R. A. Harrison* obtained a rule *nisi* to enter a non-suit pursuant to leave reserved, on the ground that the demandant failed to prove seisin in the deceased, John Beatty, of such an estate as to entitle her to dower, and also the marriage of herself with the said John Beatty, at the time of the alleged conveyance from him to defendant.

McMichael shewed cause, contending there was evidence of seisin and of marriage, and citing *Wannacott v. Fillater*, 11 U. C. 51 ; *Lockman v. Ness*, therein referred to ; *Losee v. Murray*, 24 U. C. 586.

Harrison, contra, cited *Johnston v. McGill*, 6 U. C. 194; *Hunter v. Farr et al*, 23 U. C. 324; *Minaker v. Hawkins*, 20 U. C. 20; *Dittrick v. O'Connor*, 7 U. C. 448; *Lynch v. O'Hara*, 6 C. P. 259.

J. WILSON, J., delivered the judgment of the Court.

The first question is, whether there is evidence of the seisin of John Beatty to establish the right of the demandant to recover dower as his widow against Robert Beatty, the defendant. The demandant gives evidence of John's seisin in two ways, first, by the defendant's admission, secondly, by his deed. The oral testimony amounts to this, that the defendant declared John was to convey this land to him, and afterwards that he had conveyed it. The written testimony is the memorial of John's deed to the defendant under the hand and seal of the defendant himself, reciting the conveyance of this land to him in fee by John. The defendant is not estopped from shewing that John was not in fact seised of the land, as was held in *Dittrick v. O'Connor*, (7 U. C. R. 448.) There the learned Chief Justice said, in speaking of the effect of taking a deed from one who had no title, "All that can be said is that Walter by taking a title from Robert would be held so far to have admitted his title as to make it unnecessary in any action to which he was a party to give proof of the seisin of Robert at the time of his making such conveyance." See his observations on this in *Minaker v. Hawkins*, (20 U. C. R. 20); *Davenport v. Davis*, (7 C. P. 40.) We think it was open for the demandant to prove the seisin of John, by proving the title in him, or by giving evidence that the defendant recognized his seisin. She adopted the latter mode, and proved his recognition of that seisin by his declaration and by his deed, and by proof of John's having been before the conveyance off and on the land.

The second question is, whether there is evidence of the marriage of John with the demandant. The demandant seeks to establish it, first, by reputation, secondly, by the defendant's recognition of it.

From the evidence, we infer this land was sold by John to Robert for the purpose of bringing the demandant and her children to this Province; for when the defendant was speaking of his conveyance of this land, he said "John's wife is to sign the deed when she comes out." She came out, John recognized her as his wife, and as his house was not then ready for her reception, they went to live with the defendant, who recognized her as his brother's wife, and they lived together as man and wife till his death.

Our Courts have very reasonably held, that the same evidence of marriage which would sustain a pedigree in an action of ejectment, will be sufficient to sustain a marriage in an action for dower on the issue of *ne unques accouplé*.

But the reputation of the relation of man and wife existing till the death of one of them has been held *primá facie* evidence of marriage. See *Losee v. Murray*, 24 U. C. R. 586, the last case recognizing this doctrine.

Here we have that reputation and more. We have the evidence of one brother recognizing the other brother's wife, and receiving and entertaining her as such till his brother's death, and, for all that appears, never denying that relation till she brought this action. Irrespective of general reputation, which is *primá facie* evidence of marriage, we should see nothing in principle against holding, that the recognition by this defendant of his brother's wife on her arrival with her family from England to join her husband and settle here was *primá facie* evidence against him in this claim for dower, that his brother and his wife were married.

We think the rule must be discharged, and the verdict stand for the demandant.

Rule discharged.

WHYTE V. TREADWELL (SHERIFF).

Insolvency—Execution—Attachment—Priority.

By sec. 13 of 29 Vic., ch. 18, the divesting of any lien or privilege (*i.e.* priority of right) does not extend beyond the fact of levying upon or seizing under the writ of execution: it does not extend to the *sale* thereunder. In this case a writ of execution had been placed in the Sheriff's hands on 15th March, 1866, and on the 26th of the same month a *sale* of the goods thereunder, commenced at 10, a. m., was completed at 11, a. m. At the latter hour of this subsequent day a writ of attachment was placed in the Sheriff's hands against the defendant:

Held, that the attachment was not entitled to prevail over the execution, and that the Sheriff was not, therefore, liable to the assignee of the insolvent for having sold under the execution.

Converse v. Michie, 16 C. P. 167, distinguished.

This was an action brought by the plaintiff as assignee of the estate and effects of Adolphus H. James, an insolvent, against the defendant, Sheriff of the United Counties of Prescott and Russell, to recover certain goods and chattels, which he claimed as part of the estate of the said James, or the money which they sold for, on an execution of Albert Hagan against said James.

The declaration contained three counts: 1st, for converting the goods after James became insolvent; 2nd, for wrongfully depriving the plaintiff of the goods after the insolvency of James; and 3rd, the common counts for money had and received.

The defendant pleaded not guilty to the first two counts, and also, to the first count, that the goods were not the goods of plaintiff. To the second count he pleaded that the plaintiff was not possessed of the goods, and to the third count, never indebted.

The cause was tried before *A. Wilson, J.*, at the last Spring Assizes, at L'Orignal.

The plaintiff put in the writ of attachment which had issued on the 26th March, about 11 o'clock, a.m., and at that hour delivered to the Sheriff. It had been sued out at the instance of John Foulds and Jonathan Hodgson to attach the estate, &c., of Adolphus H. James. The fiat of the Judge of the County Court was given on the same day for the writ. On the 3rd day of April, the Sheriff returned that he had

attached the estate, &c., of James and placed the same in the custody of John Whyte, of the City of Montreal, Official Assignee, &c., who was willing to accept and did accept the guardianship thereof, and the inventory of the estate was annexed, but it did not contain any of the goods now in question.

The appointment of John Whyte was put in, showing that he was Official Assignee of the City of Montreal, duly appointed by the Board of Trade of the said city, and had been appointed Official Assignee of this estate.

It was proved that on the 15th March, 1866, a writ of *fi. fa.* against the goods of James, at the suit of Hagan, had been placed in the Sheriff's hands, endorsed to levy \$735.08 debt and \$17.65 costs, and that on that day his goods had been seized; that on the 26th March these goods had been sold by the Sheriff's bailiff, at the place of business of James, twenty-six miles from L'Orignal, where the Sheriff's office was; that this sale commenced at 10 o'clock, and was concluded at 11 o'clock that morning; that Hagan was present at the sale and purchased goods to the value of \$417.29; that other parties had bought goods to the value of \$34.58; that these goods had been then delivered to Hagan, and the money which was got from the other goods paid over to him. It was proved that at 11, a.m., of the 26th, the attachment in insolvency against James was delivered to the Sheriff, who as soon as he reasonably could sent a bailiff to stop the sale on the execution. This messenger met the former bailiff, as he was returning from having completed the sale, six miles from where the sale had taken place.

A demand upon the Sheriff for the goods was proved, or for the money arising from them. The Sheriff in substance answered that he had only done his duty in regard to the execution of the *fi. fa.*, and had neither the goods nor money to give the plaintiff.

A verdict was rendered for the defendant, with liberty to the plaintiff to move to enter a verdict for him for \$441.87, if the Court should be of opinion he was entitled to it under the evidence.

Accordingly, *E. Martin* obtained a rule *nisi* to set aside the verdict for defendant, and enter it for plaintiff for \$441.87, less costs and Sheriff's fees, on the ground that the plaintiff established his ownership of the goods prior to the sale thereof, the property in the goods vesting in the plaintiff, as assignee of James, by relation, from the first moment of the day on which the writ of attachment issued, and that the plaintiff therefore was entitled to the goods, or to the money, the proceeds of the goods.

S. Richards, Q. C., shewed cause, citing Insolvent Act of 1864, sec. 2, sub-sec. 7, s. 22; *Converse v. Michie*, 16 C. P. 167; 1 Bro. & B. 370; *Regina v. Edwards*, 9 Exch. 36; *Thomas v. DeSanges*, 2 B. & Al. 586; Insol. Act of 1865, s. 12; 11 M. & W. 571; 6 B. & Cr. 469; 8 M. & W. 475, 726.

Martin, contra, relied on *Converse v. Michie*, and contended that in legal fiction the goods became the property of the assignee at the earliest moment of the day the attachment issued, and had therefore priority over the execution; that the plaintiff was entitled to the goods, or, if the property in them had passed, the money received for them. He cited *Balme v. Hutton*, 9 Bing. 474, 478, 522, 524; *Wright v. Mills*, 4 M. & W. 490; *Maher v. Maher*, L. R. 2 Ex. 153.

J. WILSON, J., delivered the judgment of the Court.

The plaintiff has put his case in a very intelligible form. He says, True, as matter of fact, the goods were sold before the attachment issued, but every judicial act is, by a fiction of law, supposed to be done at the earliest hour of the day on which it is done. The attachment issued therefore issued in law not at eleven, when it was issued, but at the earliest hour of the morning possible. The statute vests the estate of an insolvent in his assignee "at the date of the issue of the writ:" these goods were therefore by this fiction vested in me before they were sold, and so I claim them, or the money for which they were sold.

In *Russell v. Ledsam* (14 M. & W. 582), *Parke*, B. says, "The law never takes notice of the fraction of a day, except

where there are conflicting rights between subjects." But in this case there are no conflicting rights of parties requiring the Court to take notice of fractions of a day arising from the operation of law. (See this discussed in *Converse v. Michie*). In this view of the case the defendant, as Sheriff, had a right to sell these goods on the execution of Hagan at the time he did it. Hagan had a right to purchase the goods on his execution. He had a right to be paid the money made on the execution. The goods and the money were his in law when he got them. The Sheriff had done nothing contrary to law or his duty in all that he did; but after all has been done, and properly done, the plaintiff contends that the Court shall not notice the fraction of a day, but hold that this attachment vested the goods in him before it actually issued, and thus divest Hagan of all his rights and make the plaintiff, who did all as an officer of the law, liable as a wrong doer.

We are not, we think, required to decide this case on the principle evoked, for we think it depends upon the construction of our own Insolvents Acts.

Referring first to the Act of 1865, to amend the Insolvent Act of 1864, we find it declared in sec. 13, "that no lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt by the issue or delivery to the plaintiff of any writ of execution, or by levying upon or seizing under such writ the effects of the insolvent, unless such writ of execution shall have issued and been delivered to the Sheriff at least thirty days before the execution of the assignment or the issue of a writ of attachment under the said Act." Now, by this clause, the divesting of any lien or privilege, by which we understand priority of right, does not extend beyond the fact of levying upon or seizing under the writ of execution: it does not extend to the sale under the execution.

If we enquire when the estate became vested in the assignee, we have the answer in the 22nd sub-section of section 3 of the Act of 1864: "By the effect of his appointment the whole of the estate and effects of the insolvent as existing at the date

of the issue of the writ, and which may accrue to him by any title whatsoever, up to the time of his discharge under that act, and whether seized or not seized under the writ of attachment, shall vest in the said official assignee in the same manner and to the same extent, and with the same exceptions, as if a voluntary assignment of the estate of the insolvent had been at that date executed in his favor by the insolvent.

But sect. 12 of the act of 1865, declares that the operation of the sub-sec. 7 of sec. 2, and of the sub-sec. 22 of sec. 3 of the said act (1864) shall extend to all the assets of the insolvent of every kind and description, although they are actually under seizure, &c., under any writ of execution, so long as they are *not actually sold* by the Sheriff or Sheriff's officer under such writ.

By the Act there are two modes of vesting the estate in the assignee, one by operation of law, the issuing of an attachment, the other by the insolvent's own act, the executing of a deed of assignment. Now, by the act of the party himself the estate vests from the date of the execution of the deed of assignment, that is, from the time at which the deed is executed. It has no retrospective operation, but by the words of the Act the writ of attachment shall vest in the official assignee (the estate) in the same manner and to the same extent, and with the same exceptions, as if a voluntary assignment of the estate had been at that date executed in his favor by the insolvent.

We think the Legislature was dealing with fact, not legal fiction, and intended that, whether by attachment or assignment, the result should be the same, and should take effect when actually done.

Section 13 of the Act of 1865, already quoted, shows, we think, that the execution of a deed of assignment and the issuing of a writ of attachment are spoken of as one point of time, from which the thirty days mentioned therein are to be computed.

We think the attachment was intended to take effect when it issued in fact, and that the sale under the execution was good.

This case does not interfere with the decision in *Converse v. Michie* in any way. There the goods were still the property of the debtor when the two writs were given to the Sheriff by the execution and the attachment creditors; here the property was entirely gone and formed no part of the estate of the debtor when the attachment issued; so that the subject in respect of which the contention there arose did not exist here at all. When the attachment was given to the Sheriff there was nothing for it to operate upon, and it is not quite just to defeat subsisting and vested rights by the doctrine of relation, or by *ex post facto* occurrences. The rule will be discharged.

Rule discharged.

CARSCADEN V. SHORE.

Sale of land—Mode of payment—Verbal agreement—Mistake—Right to recover back—Common counts—New trial.

Plaintiff having bought a lot of land from defendant, agreed to pay him \$1,000 on a certain day, and to give a mortgage on the lot for the balance of the purchase money, the defendant agreeing to accept in part payment of the latter an assignment of a mortgage held by defendant for \$1,600, bearing 6 per cent. interest, which was to be sold to defendant at such a reduction as would pay him 8 per cent. On a calculation made as to what this reduction should be, plaintiff objected that it was too great, but defendant replied that if it turned out that there had been a mistake he would rectify it. Defendant then credited plaintiff on his mortgage with the amount at which the other had been taken. It was subsequently ascertained that an error had been made in the calculation, to the extent of some \$200. Defendant sued plaintiff on his mortgage for the balance of the purchase money, less the sum for which he had given him credit, and though admitting there had been a mistake in arriving at that sum, he refused to correct it, and plaintiff paid him in full under pressure of the suit, but also under protest:

Held, that the agreement for the sale of the mortgage was not an agreement relating to the sale of land requiring it to have been in writing.

Held, also, that plaintiff was entitled to recover back the \$200, for that it could not be considered a payment for the recovery of which he was estopped by what took place when he was sued; but that he could not recover on the common counts for money had and received. The Court, therefore, instead of entering a verdict for the plaintiff, as moved, pursuant to leave, granted a new trial, with liberty to plaintiff to amend his declaration.

Action on the common counts for money paid; money had and received, &c.

Pleas, never indebted and payment.

Issue.

The cause was tried at the last Spring Assizes for the County of York, before the Chief Justice of this Court.

The facts were, that the plaintiff agreed to buy a lot of land in Collingwood from the defendant for \$4,400. This was in the fall of 1863. The plaintiff was to pay \$1,000 in the spring of 1864, and give a mortgage for the balance to the defendant at 10 per cent.

The plaintiff mentioned he had a mortgage on some land in Otonabee for \$1,600, at 6 per cent., payable in yearly instalments of \$200. It was agreed the defendant was to take this last mortgage on account of the first mortgage, at such a sum as would produce to the defendant 8 per cent per annum.

On the 25th of February, 1864, the plaintiff paid the balance of the \$1,000 instalment, and he brought the \$1,600 mortgage to an attorney's office in Collingwood, where the defendant met him. They asked him to calculate what should be allowed to the defendant as a deduction from it to pay 8 per cent. per annum. He said he could not do it with any accuracy. It was calculated by the postmaster there, and he made the sum \$1,240, which should be allowed for it by the defendant to the plaintiff. It was objected that this was too little, but the defendant said if it was not right he would make it right. It was then closed at \$1,240, and the endorsement of that amount was made on the first mortgage and an assignment of the \$1,600 was executed. The computation was afterwards tried by five different persons who all made the amount different. It was tried by the rule of a Building Society and found that the sum allowed as a credit to the plaintiff was too small. The defendant was told of it, but he said he had to sell the mortgage and he did not get any more than he had given the plaintiff, and he thought it was about right.

In May, 1866, the defendant sued the plaintiff on the first mortgage, and the balance of it was paid to the defendant. The defendant admitted there was a mistake in the

computation on the \$1,600, but he refused to make any correction: the only thing he would consent to do was to throw off the costs of his suit against the plaintiff: he threatened to go on with his suit and the balance he claimed was paid to him. The plaintiff said he would not take the costs for his claim; he would rather pay it under protest and seek his remedy against the defendant. The parties were there together in May, 1866, when this took place, and the money was paid.

The amount that should have been allowed by the defendant to the plaintiff, according to the Building Society's rule, was found to be \$1,480. The Secretary of another Building Society made it \$1,484 80.

The defendant's counsel objected that the plaintiff could not recover; for if the mortgage sold was to be considered as goods or property sold, then the assignment shewed the consideration was \$1,240 only, and the payment of this sum had been acknowledged under seal by the plaintiff; the endorsement on the mortgage shewed the same thing; and the plea of payment was therefore an answer to the demand.

It was further objected that if the money paid was to be considered as that which was to be paid to settle the suit brought by the defendant against the plaintiff on his mortgage, then the money claimed was in fact money sought to be recovered back, and this could not be allowed, for it was not paid by mistake or any other pressure than the mere pressure of the suit, and a payment made under such circumstances could not be recovered back.

The Chief Justice thought this objection might be entitled to prevail, but that the plaintiff might, perhaps, recover on the special agreement. It was left to the jury to say whether there was in fact an agreement between the parties such as had been stated; if there was not, to find for the defendant, if there was, then they were to say if the value of the mortgage to the plaintiff at the sale mentioned was more than the \$1,200 which had been allowed to him; and if it were more than that sum, then how much more.

The jury found it was worth \$206.78 to the plaintiff more than had been allowed to him by the defendant, and they apparently found that such an agreement had been made as had been sworn to.

The Chief Justice here directed a nonsuit to be entered, with leave to the plaintiff to move to enter a verdict for him for the above amount, if the Court should be of opinion the plaintiff was entitled to recover in this action under the evidence.

J. McBride obtained a rule to set aside the nonsuit and enter a verdict for the plaintiff for \$206.98, which included interest, or for \$196.32, which excluded interest, pursuant to the leave reserved.

M. C. Cameron, Q. C., shewed cause:—

The plaintiff, when sued by the defendant on his mortgage, should have pleaded as payment the sum which he now contends had been credited to him too little upon it at the time when the mortgage for \$1600 was assigned. It was a voluntary payment, made under no mistake and by no fraud, and cannot therefore be recovered in this action, for it is the same as if it were an attempt to recover so much money back again: *Brown v. McKinnally*, 1 Es. 279; *Baldwin v. Johnson*, 2 U. C. 482; *Marriott v. Hampton*, 7 T. R. 269; *De Medina v. Grove*, 10 Q. B. 172; *Gulliver v. Cosens*, 1 C. B. 788. This, too, is an agreement concerning an interest in land, for it was the sale of a mortgage (*Cowan v. Johnstone*, 25 U. C. 476), and should have been in writing. The amount in question should have been set up in the previous action: *Stephens v. Boulton*, 23 U. C. 16.

McBride, contra:

The verbal bargain to allow the plaintiff a particular sum on his computation of the mortgage money was not a contract relating to the sale of land. The receipt given by the defendant for the \$1240 was not inconsistent with his allowing the correct sum when the mistake was discovered: *Bramston v. Robins*, 4 Bing. 11; *Skyring v. Greenwood*, 4 B. & C. 281.

A. WILSON, J., delivered the judgment of the Court.— I do not think this was an agreement relating to the sale of land so as to have required the transaction to have been in writing. The defendant took the mortgage debt against the Otonabee land at a particular price, according to a certain mode or rate of computation, and on being told the sum of \$1,240 was too small a sum to allow for it, according to the terms agreed upon, he said he would make it right, that is, he would pay any further sum, if it appeared, on a correct computation, he should pay more.

The price of land sold when the conveyances have been executed, and when all that remains to be settled for is the price of the land, may be recovered under the common count for lands sold and conveyed.

I see no reason why the like count might not be sustained by the mortgagor against the mortgagee, or by the assignor of a mortgage against the assignee of it, if, after the execution of the mortgage or assignment, the mortgagee or assignee refused to pay the consideration money.

If the action were brought by the mortgagor against the mortgagee, the count should very likely be for lands sold and conveyed; and, perhaps, the same count might answer if the action were by the mortgagee against the assignee; or a count for the sale and assignment of a certain mortgage or security for the payment of money, or for the sale of a certain debt due on the mortgage, might be sufficient— *Graham v. Gracie* (13 Q. B. 548); *Falmouth v. Penrose* (6 B. & C. 385).

There is no doubt that the mortgagee may sue the mortgagor for money lent in assumpsit, though there be a mortgage deed, if there is no covenant for the payment of money: *Yates v. Ashton* (4 Q. B. 182); *Mathew v. Blackmore* (1 H. & N. 762). The plaintiff is not prevented from recovering the money in question because he has not a writing signed by the defendant charging him with the payment of it. The case is not at all affected by the one of *Cowan v. Johnstone* (25 U. C. Q. B.) before cited.

But it is said the plaintiff cannot recover the money now,

because he should have insisted on getting the benefit of it as a payment or deduction upon account of or from the mortgage money due by himself, when he was sued for it by the defendant, and not having done so then, he is not entitled to ask for its allowance now.

If this were clearly a payment which had been made on account of the mortgage, and not a set-off or a claim enforceable under a special count, the argument of the defendant must be correct, that the plaintiff cannot, when he allowed the proper period of settlement to pass by, and more particularly when he paid it pending a writ, and by reason of the pressure of that writ, under no kind of mistake, with a full knowledge of all the circumstances, and without any kind of fraud on the part of the defendant, though insisted on by him upon a ground which he considered a reasonable cause for his refusal to allow the sum demanded, be permitted to re-open that transaction and suit, by the maintaining this action.

The authorities are very clear against the right to adopt such a course. •

The question is, is this the course which the plaintiff is taking ?

Was this disputed sum a *payment*—technically a payment, made by the plaintiff to the defendant on account of the mortgage ?

The defendant never agreed to allow more than the smaller sum of \$1,240 as a specific credit to the plaintiff. He agreed, it is true, to allow the plaintiff as large a sum as would remain after deducting for himself a sufficiency to yield him annually eight per cent. ; but the sum that would be plaintiff's proportion by the arrangement he admitted to be \$1,240, and no more. He said he *would* allow more, if more were rightly claimable, upon a true calculation being made ; but he never did allow it, and he has never since the first promise, upon taking the assignment, said he would allow it : he has in fact since then always refused to allow it.

Payment is a transaction which requires the concurrence of both the payer and the payee to it : it cannot be made a

payment by the act of either of them against the consent of the other. This concurrence may be implied from circumstances and conduct as well as from language: *Thomas v. Cross* (7 Exch. 728); *Caine v. Coulton* (1 H. & C. 764).

No payment of the disputed sum was in fact made and accepted when the assignment was made. Upon discovering the mistake and informing the defendant of it, if he had assented to it, his assent would have constituted a payment, or been evidence of it, and been held to have related back to the time of the assignment.

It may be, too, that the plaintiff might, if he had chosen to have treated the sum as a payment, have done so even against the defendant's subsequent denial, because the defendant had agreed to allow it if the plaintiff was entitled to it, and it did appear afterwards the plaintiff was entitled to it, and that the defendant was informed of it.

But even this view will not wholly decide the case, for although the plaintiff *might* have treated it as a payment if he had liked, was he bound to do so when the defendant refused to admit it?

The plaintiff might have said, "I am willing to consider this as a payment or deduction, if you are willing to allow it: if you are not, then I will sue you for the amount as a sum specifically due to me on and in respect of the original transaction."

I am inclined to think the plaintiff is not estopped by what took place when he was sued, from recovering the money in question. He certainly is not precluded from recovering it, if he could have treated the sum as a set-off, for he was not obliged to set-off his demand against the defendant's claim,

I am not satisfied this sum was at any time a *payment* technically considered.

If the plaintiff could have considered it as such, he did not do so upon the defendant's refusal to recognise it. There was evidence then that both parties were agreed this sum should not be a payment, or be dealt with as a payment, even if it could have been treated as a payment in strict law.

If the plaintiff is entitled to recover this money, we are not satisfied he can do so as for money had and received to his use, or under any of the forms in the declaration contained. It is very probable the plaintiff may have to add such counts as will correctly describe the bargain or transaction at the time it was entered into, and as we think he can recover it on a count properly adapted to his claim, we think the present rule should be so far modified that, while setting aside the nonsuit, we should not order a verdict to be entered for the plaintiff, but order instead a new trial to be had between the parties, giving leave to the plaintiff to amend his declaration as he may be advised, upon payment of the costs of the day, of this application, and of the amendment, within eight weeks.

Rule accordingly.

BAIN (*Administrator*) v. McINTYRE.

Executor de son tort—Term of years—Pleading.

Held, on demurrer to the plea set out below, that the sale of the reversion in a term of years under *fi fa.* on a judgment against executor *de son tort* is a valid sale as against the rightful administrator; and *Semble*, it is not necessary to the validity of the sale that the *tort* Executor should have been in actual possession in respect of the term.

Declaration, for goods sold and delivered by the intestate to the defendant, &c., and for the use and occupation by the defendant in the lifetime of the intestate of a messuage and lands of the intestate.

Ninth *plea* (to so much of the count for use and occupation as had elapsed since 25th of October, 1865, and since the death of the intestate), that the intestate had only a leasehold interest, to wit, a term of years, in the premises, and after his death and before grant of administration to plaintiff, one Elizabeth, widow of the intestate, took possession of all the goods and chattels and personal property of the intestate, and used and intermeddled with the same as executrix;

that one Samuel Howell afterwards duly recovered a judgment against said Elizabeth, as executor of deceased, in the County Court of the County of Carleton, for the sum of £40 0s. 2d. for his damages, &c., to be levied of the goods and chattels of the deceased, in the hands of Elizabeth, as such executrix, if she had so much thereof in her hands to be administered, and if she had not so much thereof in her hands to be administered, then the sum of £2 18s. 8d. for the costs and charges to be levied of the proper goods and chattels of the said Elizabeth; upon which judgment Howell caused a writ of *fieri facias* against goods of said Elizabeth, as executor, to be issued, &c., by virtue of which the Sheriff of the County of Carleton seized and took in execution the said leasehold premises, and having duly advertised the same according to law, offered the same for sale at public auction under said writ on the 25th of October, 1865, while the defendant was in the use and occupation of said leasehold premises, and at such sale one Joseph Davidson was the highest bidder and became the purchaser of the said messuage and land, and of all the right, title and interest of deceased therein, for a large sum of money, to wit, the whole of the moneys for which the judgment had been recovered; whereupon the Sheriff executed a conveyance of said leasehold land to said Joseph Davidson, and by virtue thereof all the right, title and interest of deceased in said leasehold premises became vested in said Joseph Davidson for the residue of the time therein possessed by deceased at the time of his death, of which defendant then had notice, and was required to pay the said rent thereof thereafter to said purchaser, or his assigns; and defendant did thereupon attorn to and had ever since the 25th of October, 1865, paid and satisfied the said rent to the purchaser, Joseph Davidson, and his assigns.

Demurrer—1. That a term of years or interest in land of deceased, such as mentioned in ninth plea, was not saleable under an execution founded on a judgment recovered against an executrix of her own wrong, as alleged in the plea.

2. If saleable, it could only be so upon being reduced into

the actual possession of such executrix, and the plea did not show such possession, but, on the contrary, shewed the possession to have been in the defendant.

3. It was not alleged that the messuage and land ever became or were goods or chattels in the hands of the said Elizabeth to be administered.

C. S. Patterson for the demurrer :—

The question is whether a term for years, which the deceased died possessed of, can be sold under a judgment against an executrix *de son tort*; *Williams Exors.* ch. 5.

It has been decided that lands and tenements cannot be sold under a judgment recovered against an executrix *de son tort*, and the same reasoning and principle must equally apply against the sale of a term for years: *McDade d. O'Connor v. Dafee*, 15 U. C. 386; *Wrathwell v. Bates*, *Ib.* 891; *Graham v. Nelson*, 6 C. P. 280.

An act done by an executor of his own wrong will not bind him when he becomes administrator: *Doe d. Hornby v. Glenn*, 1 A. & E. 49.

The plea does not show the judgment was recovered against Elizabeth before the grant of administration to the plaintiff, and if not before it would be void.

Robert A. Harrison contra :—

Creditors are entitled to treat the wrongful executor as the rightful one, for they are not presumed to know she is acting wrongfully: *Williams Exors.*, last ed., 261.

The plea alleges sufficiently she took possession of this term, for it states, “she took possession of all the goods and chattels and personal property of the deceased, and used and intermeddled with the same as executrix.”

The sale of the term which was made was therefore a rightful sale.

Patterson, in reply, referred to *Creasor v. Robinson*, 14 Beav. 580, which showed that a decree cannot be made upon a judgment recovered against an executrix of her own wrong, and that the estate must be represented by a rightful representative.

A. WILSON, J., delivered the judgment of the Court.

This case is not necessarily connected with, or governed by the cases of *McDade d. O'Connor v. Dafee* and the others which were cited, which have followed it, for these all relate to freehold lands, while the present case applies to an estate for years only.

In *Williams* on Executors (chap. 5) it is said "there may be a tort executor of a term for years, as where a man enters upon the land leased to the deceased and takes possession claiming the particular estate, though with respect to a term of years in reversion there can be no executorship of this nature, because it is incapable of entry."

The *Mayor of Norwich v. Johnson*, (3 Lev. 35, 3 Mod. 90) shows there may be a tort executor of a term for years. In that case he was held liable in waste as such executor, and it appeared on the pleadings he was not a rightful executor.

In *Abraham v. Cunningham*, (2 Mod. 146) it was held that the sale of a term by an administrator was void, it afterwards appearing there was an executor, although the executor renounced.

In *Doe d. Hornby v. Glenn*, (1 A. & E. 49) it was held that the surrender of a term by an executor of his own wrong was invalid, and that he himself could dispute his right to make it, on becoming rightful administrator.

In *Paull v. Simpson*, (9 Q. B. 365) the widow, as executrix of her own wrong of her deceased husband, transferred the leasehold property of the estate to the defendant by some arrangement made with him. There could have been no assignment in fact made by her because there was no writing, and the defendant could not have been in possession by assignment in law, for his taking the property from the executrix *de son tort* did not make him an executor *de son tort* too.

It is admitted throughout the case that she took the term by wrong, and the Court held that her giving the lease to the defendant and his taking possession from her did not make him a wrongful executor.

Lord *Denman*, C. J., said,

“Sir *John Bayley* endeavored to draw a distinction between a lease and an ordinary chattel, but there is no ground for it: a lease vests at once like a chattel.”

Wightman, J., said,

“A person, who is executor *de son tort*, is executor generally.” The representative is always presumed to have assets, unless he plead he has fully administered, in which case it lies upon the creditor to prove that the defendant has actually received assets which he has not administered: *Cooper v. Taylor* (6 M. & G. 989); *Meynch v. Anderson* (14 Q. B. 727); *Gates v. Dyson* (1 Stark 32); *Stearn v. Mills* (4 B. & Ad. 657).

The Sheriff, under the execution to levy the goods of the deceased, which are in the hands of the defendant, as executor to be administered, knows and can know no difference between a rightful and a wrongful executor, and must take any of the goods of the deceased which he can find liable for the payment of debts and sell them. In *the hands* of the executor means *at his disposal*: *Cooper v. Taylor* 6 M. & G. 989; and all personalty belonging to the deceased is at the disposal of the executor.

It cannot be disputed that an assignment of property made by a person, who is not a rightful executor, will not bind him when he takes out administration: *Doe d. Hornby v. Glenn* (1 A. & E. 49); *Metten v. Brown* (7 H. & C. 686); it will only bind him when the act is lawful, and is such an act as the true representative was bound to perform in the due course of administration: *Berckley v. Barber* (6 Exch. 164); and only when the act done is for the benefit of the estate: *Morgan v. Thomas* (8 Exch. 302).

But when the Sheriff administers the estate, the like objections do not apply: he is doing just what the rightful executor would be obliged to do, and just what he, the Sheriff, would have to do against the rightful executor, if the process were against him. The proceeding therefore must be presumed to be beneficial to the estate.

In case of fraud between the creditor and the wrongful

executor the recovery could no doubt be questioned: *The Mayor of Norwich v. Johnson* (3 Mod. 93). In the absence of fraud there seems to be no valid reason why the creditor should not, on a judgment against an executor of his own wrong, be paid his debt out of any of the assets of the estate, "for he is not bound to seek further than him who acts as executor," and it is of no consequence in an administration by process of law from what fund or property the debt is paid, so long as it is a fund or property which is assets to be administered in a due course of administration.

This view does not interfere, as we have before said, with the decisions in our courts before referred to; for it is clear that a person may constitute himself an executor by wrong by intermeddling with a term for years, while our Courts have decided there can be no executor of his own wrong by interfering with freehold property.

An entry on freehold property would constitute the person a disseisor rather than an executor of his own wrong: *Bac. Ab. 'Executors'* (B. 3) 1.

I think that, on a recovery against an executor of his own wrong, the creditor can, under the ordinary process, seize and sell a term of years which belonged to the deceased and is part of his estate to be applied in a due course of administration.

It is sufficiently shown, if it be necessary to show it, that the executrix by wrong possessed herself of the leasehold interest, and it is not necessary the plea should have shown judgment was recovered before the grant of administration was made to the plaintiff, for the same reason applies, "the creditor is not bound to seek further than him who acts as executor;" and if the plaintiff mean to show that the title which is good, *primâ facie*, against him, is in fact invalid for any reason, he ought to reply it.

Judgment will be for the defendant on demurrer.

Judgment for defendant on demurrer.

THE BANK OF MONTREAL V. MCWHIRTER.

Sale of goods—Weight not ascertained—Delivery at future time—Insolvency of vendor—27 & 28 Vic. ch. 17, sec. 8. sub-sec. 2—Chattel mortgage to Bank—Validity though not filed—C. S. C. ch. 54, sec. 4.

On the 13th of September, 1866, S. agreed to deliver on account of K. at a railway station, when wanted, 600 boxes factory cheese at a certain rate per pound, and to keep the same insured until wanted. The weight of cheese had not at this time been ascertained; in fact, the whole quantity had not been manufactured. Subsequently two warehouse receipts, dated respectively 21st September and 9th October, were given to K., the one for 330 and the other for 230 boxes, signed by S., and specifying the weight of the cheese. On the 22nd of October K. executed a mortgage to plaintiffs on 400 boxes of cheese purchased by him from S. on or about the 13th of September, and then in the curing house of S., to secure the payment of moneys advanced to him by plaintiffs upon the security of part of the cheese. This mortgage was not filed. S. became insolvent on the 19th of October following, and K. became aware of it on the following day. The plaintiffs replevied 341 boxes of cheese:

Quære, whether the property in the cheese passed to K. on the 13th of September; but if it did not, because the weight had not been then ascertained, that objection was removed on the 21st of September, as the receipts of that date specified the weight. But, *Held*, that the fact that the cheese was not to be delivered until a future time, when K. wanted it, and that S. was to keep it insured in the meantime, did not prevent the property passing; for it is the intention of the parties to the contract which is to govern in such cases.

Held, also, that even if the property did not pass before the 21st of September, in consequence of the weight not having been before then ascertained, the subsequent insolvency of S. did not affect K's. right respecting it; for that the only portion of the Insolvency Act of 1864 applicable to the case (sec. 8, sub-sec. 2) did not in fact apply, as there was no evidence here of obstructing or injuring creditors, but the contrary, the property having been sold at its full value; but, even if the case were within the operation of that clause of the act, the contract would be voidable only, under the order of a competent tribunal, and no such order had yet been made, and would only be made upon such protective terms to the person from actual loss or liability as the Court might direct.

Held, also, that the mortgage to the plaintiffs was valid, having been taken "by way of additional security for a debt contracted to the Bank in the course of its business," and therefore within C. S. C. ch. 54, sec. 4; that it could not be impeached by any one for want of filing but an opposing creditor of K., and that as S. could not impeach it, neither could the defendant, his assignee in insolvency.

Replevin, for detaining 341 factory cheeses or boxes of factory cheese.

Plea, denying goods were plaintiffs'.

Issue.

The cause was tried at the last assizes, held at London, before the Chief Justice of Upper Canada, and a verdict

recorded for the plaintiffs, the defendant having leave to move the Court to enter a verdict for him, if they thought the verdict should be so entered, the Court to be at liberty to draw inferences of fact.

The evidence shewed that Andes Smith carried on the business of cheese making in the Township of Norwich, and that Kains had bought cheese from him before the transactions of last fall. On the 14th of September, Kains, at Smith's request, went to Norwich, when the following receipt was given :

“NORWICH, 13th September, 1866.

“Received from William K. Kains two hundred dollars on account of sixteen hundred boxes factory cheese, weighing about thirty tons, which I hereby agree to deliver free on board cars at the Woodstock station, Great Western Railway, when wanted, at the rate of eleven and a quarter cents per pound. I also agree to receive in part payment of the above one thousand dollars in American silver at par—balance of purchase money to be paid on the delivery of the cheese.

“I also agree to keep the cheese insured until wanted.

“ANDES SMITH,

“P. P. Atty. A. S. Jr.”

Kains said he purchased all the cheese that Smith then had in his curing house. There were then 576 cheeses in the store, and the number between 576 and 600 had to be made. On the 21st of September, Kains paid the further sum of three thousand eight hundred dollars on account to Smith, and a receipt for the same was given in like terms of the previous one.

Two formal warehouse receipts were given, dated respectively the 21st September and the 9th of October ; the one for 330 boxes, 36,300 lbs. of cheese, the other for 250 boxes, 25,000 lbs. They are in printed form, as follows, filled up with the name, quantity, &c., alike :

“WAREHOUSE RECEIPT.

“Received in store, from W. K. Kains, three hundred and thirty boxes factory cheese, 36,300 lbs., to be delivered pursuant to his order, to be endorsed hereon. This is to be regarded as a receipt under the provisions of Statute 22nd Vic., ch. 20, being 22 Vic., ch. 54 of the Consolidated Statutes of Upper Canada, and the amended Statute 24 Vic., ch. 23.

“ANDES SMITH, SR.,

“P. P. Atty. A. S. Jr.

“C. W., 21st Sept., 1866,

“Township of Norwich,

“County of Oxford, C. W.”

On Smith getting another large advance Kains gave up the former receipts and took one for \$6,500, which money Kains got from the plaintiffs. In consideration of immediate payment Smith agreed to take ten and three-quarter cents per pound instead of eleven and one-quarter cents.

The receipt of the 9th of October for the \$6,500 was like the one of the 13th of September, above stated.

On the 22nd of October Kains made a mortgage to the plaintiffs of four hundred cheeses, or boxes of cheeses, purchased by Kains from Andes Smith on or about the 13th of September, (two hundred boxes having been heretofore shipped,) then in the curing house and in the building of Andes Smith, in the Township of Norwich, the same being the cheeses therein marked as manufactured, or dated, prior to the 13th of September last, to secure the payment by Kains of \$6,200 forthwith, the same being the unpaid balance of money advanced by the plaintiffs upon the security of the cheese. This mortgage was not filed.

Three hundred and forty-one boxes or cheeses were replevied. Kains paid Smith more than the cheese delivered came to. Kains first heard of Smith's insolvency on the 20th of October. Shortly after that Kains asked Smith to deliver the rest of the cheese, that is, all beyond the two

hundred before delivered, and four sample cheeses Kains had got. He declined.

On Kains presenting the warehouse receipt to the plaintiffs he got an advance from them of eleven cents per pound, and he endorsed the warehouse receipts in blank to the plaintiffs. The cheeses were not in Kain's possession when he made the mortgage. The writ of replevin was sued out on the 24th of October.

At the close of the plaintiffs' case the defendant's counsel made sundry objections, which are embodied in the rule set out below.

For the defence, the copy of a voluntary assignment made by Andes Smith, under the Insolvent Act, dated the 19th October, to the defendant, was put in.

Beecher, Q. C., obtained a rule calling on the plaintiffs to shew cause why the verdict entered should not be set aside and a verdict be entered for the defendant, because—

1. The receipts purporting to be warehouse receipts were not warehouse receipts under the statute, and the plaintiffs had no right to advance money on them.

2. The plaintiffs had no authority to take the bill of sale from Kains.

3. The bill of sale was void for want of registry.

4. Kains' contract, as evidenced by the two first receipts, was rescinded by the contract of 9th October, which was the only contract, and the receipt or contract of that date was executory, and being unfulfilled the plaintiffs can have recourse only to the estate of the insolvent.

5. The contract of the 9th of October was within thirty days of Smith's insolvency, and neither contract vested the property in Kains, and it never vested in the Bank.

M. C. Cameron Q. C., shewed cause:—

The property in the cheese passed to Kains by the payment and writing of the 13th of September. Smith's insolvency on the 19th of October did not therefore affect the property, and Kains had the power to transfer it to the plaintiffs by the mortgage of the 22nd of October, and by

the endorsements of the warehouse receipts—*Tarling v. Baxter*, 6 B. & C. 360; *Alexander v. Gardner*, 1 B. N. C. 671; *Bloxam v. Sanders*, 4 B. & C. 941; *Addison* on Contracts 225.

It is not insisted on now that the not filing the mortgage is an objection to the plaintiffs' recovery, for as Smith could not take the objection, so neither can the defendant, his assignee.

If the defendant could properly take under the assignment, still the property did not pass to him.

The Insolvent Act of 1864, section 2, sub-section 7, shews what property of the insolvent passed to the defendant.

Section 4, sub-section 7, shews the defendant can only exercise the powers which the insolvent could exercise. See also sub-section 9. Section 8, sub-section 2, shews the transaction between Smith and Kains, if voidable at all, can only be set aside by the Insolvent Court. See also sub-sections 3, 4.

Beecher, Q. C., contra :—

The transactions and writings prior to the arrangement and receipt of the 9th of October, were rescinded by what took place on the latter date. The price was then reduced: *Moore v. Campbell*, 10 Exch. 323; *Stead v. Dawber*, 10 A. & E., 57; *Noble v. Ward*, L. R. 1 Exch. 117, 135.

But no property in the cheese passed at any time, not even by what took place on the 9th of October, for something still remained to be done to the goods before Kains could have claimed them: they had to be weighed and to be taken by Smith to the Woodstock railway station, which was several miles off from the curing house where the cheese was: *Acraman v. Morrice*, 8 C. B. 449; *Supple v. Gilmour*, 5 C. P. 318, 11 Moore P. C. C. 551; *McDougall v. Elliott*, 20 U. C. Q. B. 299; *Logan v. Le Mesurier*, 11 Jur. 109; 6 *Moore's P. C. C.*, 116; *Zagury v. Furnell*, 2 Camp. 240; *Hanson v. Meyer*, 6 East. 614; *Simmons v. Swift*, 8 D. & R. 693; *Moore v. Campbell*, 10 Exch. 323; *Paton v. Currie*, 19 U. C. 388; *Rugg v. Minett* 11 East 210; *Add. on Con.* 224-5.

The assignee of an insolvent, or creditors in insolvency, can dispute all transactions between the insolvent and others in like manner as a judgment creditor could dispute them.

As to the assignee's power, the Insolvent Act of 1864, sec. 2, sub-sec- 7, sub-sec. 22, sec. 4, sub-secs. 7, 9, and sec. 8, sub-secs. 4, 5, may be referred to.

The plaintiffs' advances on these warehouse receipts were illegally made, and the mortgage was void because it was taken to secure a debt which the Bank had not contracted in the due course of business, but contrary to ch. 54 of the Consolidated Statutes for Canada.

A. WILSON, J., delivered the judgment of the Court.

The first enquiry is, what were Kains' rights? because, if he had a good title to the property as against Smith and his assignee in insolvency (assuming him to be rightly the assignee for the purposes of this suit) it is very likely there will be found to be no impediment in the way of the plaintiffs' recovery who claim from Kains.

If the right of property in the cheese did not pass to Kains on the 13th of September, by reason that something still remained to be done to it by Smith, the seller, namely, the weighing of it, according to *Simmons v. Swift* (5 B. & C. 857) and that class of cases, that objection was removed on the 21st of September, when the quantities were ascertained, as they are specified in what are called the warehouse receipts.

But there was still the further act to be done by Smith, namely, the delivery free on board the cars at the Woodstock station when Kains wanted the goods; and this, it has been contended, also prevented the right of property from attaching at once in Kains, especially as Smith was to insure it at his own expense, and it is said his engagement was rather for a delivery at the railway station than for an immediate sale.

No doubt the general construction of such transactions as the present one is, that a sale has been made, and that the property has passed, although the possession is to remain

for a time with the vendor ; and there is no insuperable rule of law which prevents such an operation, if such were the intention of the parties, although the seller had still something to do upon or in respect of the property.

This obligation or duty upon the vendor, to deliver the cheese at the railway station several miles off, did not necessarily prevent a transfer of the property taking place by the effect of the bargain, more than the engagement by the vendor, that he would keep the cheese insured until Kains wanted it, would prevent its passing.

It is the intention of the parties which is held to govern in such contracts: *Blackburn* on the contract of sale, 121, 151, 160 ; *Logan v. Le Mesurier* (11 Jur. 1094) ; *Cusack v. Robinson* (1 B. & S. 299) ; *Aldridge v. Johnson* (7 E. & B. 885) ; *Calcutta v. De Mattos* (32 L. J. Q. B. 322) ; *Supple v. Gilmour* (5 U. C. C. P. 318, 11 Moore's P. C. C. 551.)

Considering the property in the cheese as having passed to Kains on the 21st of September, did the subsequent insolvency of Smith on the 19th of October in any way affect Kains' rights ?

The only portion of the Insolvent Act of 1864, which applies to this case, is section 8. Sub-section 2 provides that a contract for consideration, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant of such inability, and before it has become public and notorious, but within thirty days next before the assignment or attachment under the act, is voidable and may be set aside by any Court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract as the Court may order.

We are not satisfied that the contract of the 13th of September, if it is to be considered as not passing the property until the 21st of September, when the weight of the cheese was ascertained, must be held to have been made only on the 21st, so as to bring it within the thirty days mentioned in the section.

But if it should be, we do not see how a contract of this

kind for the sale of property at full value can by any strain of language be said to be one by which creditors are injured or obstructed. The statute does not avoid all contracts and conveyances made within the thirty days, as it avoids all payments made by the debtor under sub-sec. 5 within that time, but only such contracts and conveyances by which creditors are injured or obstructed, and there is no evidence of anything of the kind in this case, but the contrary.

If this contract were within the operation of the clause, still it would not be void, but voidable only under the direction and order of a court of competent jurisdiction, and no such order has yet been made, nor could it be made, unless, according to the provision of the act, "upon such terms as to the protection of the person from actual loss or liability" as the Court may order.

In no way of considering this case can we say the defendant has the right in this action to impeach the contract with Kains.

We have felt some doubt on what part of the defendant's rule all of this argument as to property in the goods having passed or not passed to Kains has been raised. It is clearly not covered by any of the first, second, third, or fifth grounds stated, and but very obscurely, if at all, by any part of the fourth ground.

The title of Kains having been a valid one, the next enquiry is, whether he by a good title passed the property to the plaintiff.

We see no objection to the Bank taking by the mortgage from Kains the property in question. It was taken, according to the evidence, "by way of additional security for a debt contracted to the Bank in the course of its business," and is therefore a transaction expressly protected by the fourth section of chap. 54 of the Consol. Stats. of Canada.

The bill of sale being valid between Kains and the Bank, it cannot be impeached by any one, for want of filing, but by an opposing creditor of Kains. Smith could not have impeached it, neither therefore can his assignee.

As we come to the conclusion that the bank had a good

title to the property in question and are entitled to retain their verdict on the grounds already stated, it is not necessary to give any opinion upon the validity of the warehouse receipts, or the power of Smith to issue them, nor whether the defendant, who did not hold at the time his appointment of official assignee under an incorporated Board of Trade was or was not a competent person to act as an official assignee under the Insolvency Act.

The rule will be discharged.

Rule discharged.

MILLER V. THE CORPORATION OF THE CITY OF HAMILTON.

Trial by proviso—Discontinuance—Failure to pay costs—Nonsuit—Costs—Practice.

The tenants in an action of dower having given notice of trial by proviso, the demandant took out and served a rule to discontinue on payment of costs, with a consent on her part that if the costs were not paid within four days, the tenant might sign judgment of *non pros*. The costs not having been paid, the tenants entered the record for trial, nonsuited the demandant, at her own election, and entered the usual judgment for the costs antecedent to and attending the nonsuit :

Held, that the service of the rule to discontinue being no stay of proceedings unless the costs taxed under it were paid, the tenants were entitled to the costs of the non-suit, and were not obliged to have taken a judgment of *non pros*. under the terms of that rule.

The Master, on revision, having disallowed these costs, as unnecessarily incurred, *held*, that he had exceeded his discretion; the general rule being that the Court awards, the Master fixes the amount of, the costs of suit.

Semble, on the authority of *Baker v. Jupp*, 3 D. & L 474, that issue having been joined, there could not properly have been a judgment of *non pros*. Per A. Wilson, J. (doubting as to the right of the tenants to have proceeded to nonsuit instead of availing themselves of the proceeding by *non pros*.) that the demandant having been a party to all that occurred, by appearing and accepting a nonsuit, could not afterwards be allowed to object to its regularity.

DOWER.

Plea, release of dower by demandant.

Issue and notice of trial.

On examining the deed set up by the tenants in their plea, the demandant countermanded the notice of trial, her attorney being satisfied that the deed contained the release set up

by the tenants' plea, and that it was actually signed by demandant, who accordingly took no further proceedings in the cause.

The tenants served a notice of trial by proviso on the 17th of March, 1866, but it was objected that the same was irregular, as there had been no proceeding within the year. That notice was therefore withdrawn and a term's notice of intention to proceed was given.

A new notice of trial by proviso was served on the 10th of September, 1866. The tenants had made an unsuccessful effort to obtain security for costs from the demandant, as residing in the State of New York, she having returned to Hamilton after the application was made, and the tenants being consequently unable to obtain the security. She subsequently returned to the United States and continued to reside there.

On the 11th of October, 1866, a side bar rule to discontinue was taken out by demandant from the office of the Deputy Clerk of the Crown, at Hamilton, in the following terms:—"It is ordered, upon payment of the defendant's costs, to be taxed by the Deputy Clerk of the Crown and Pleas in and for the County of Wentworth, that this action be discontinued, the plaintiff hereby undertaking to pay the said costs, to be taxed, and consenting that if they are not paid within four days after taxation, the defendant shall be at liberty to sign judgment of *non pros*."

On the 16th of October the costs of discontinuance were taxed at \$15.50, and a copy was served on the demandant's attorney, who declined to pay the same. The partner of the attorney for the tenants stated that he considered the same as abandoned, and entered the record for trial at the last Assizes for the County of Wentworth, on the 29th October, pursuant to the notice.

There was a variance in the respective statements of the attorneys for the plaintiff and defendant, as to what occurred in relation to the taking of the nonsuit at the trial, the demandant's attorney alleging that he informed the tenants' attorney that he was ready to consent to a nonsuit at any

time, whilst the tenants' attorney stated that the demandant's attorney did not at any time offer to consent to a nonsuit at the Assizes, as far as he could recollect, or verily believed, and when the case came on it was not until he found the tenants would have their witnesses present that he consented to take a nonsuit. This latter statement was in effect contradicted by the affidavit of the demandant's attorney.

On the 2nd of January last the tenants' costs were taxed, on entering the judgment on the nonsuit, at \$109.75.

On the 3rd of January the attorney of the demandant gave notice of the revision of the costs before the Master in Toronto. The revision took place on the 3rd of April last, when the Master struck off £21 19s. 3d., disallowing all the costs attending the entering of the record for trial and of the nonsuit, and generally all costs subsequent to the rule to discontinue, so far as the same exceeded the costs to which the tenants would have been entitled, if they had entered judgment of *non pros*, pursuant to the consent contained in the side bar rule to discontinue.

On the 13th of April last the Chief Justice of this Court ordered that the revision of taxation of the tenants' costs had before the Master should be referred back to him for reconsideration.

On the 4th of May the Master reconsidered the point, but adhered to his former decision.

J. C. Curran, for the tenants, obtained a rule calling on the demandant to shew cause why the costs should not be referred back to the Master, and the Master ordered to allow to the tenants the costs of the proceedings taken by them to have the cause brought on to trial by proviso, and the costs incident to such trial and the nonsuit and judgment entered thereon, which had been disallowed by him, on the following grounds :—

1. That the nonsuit having been ordered by the Judge who tried the cause, the Master could not inquire whether the prior proceedings to obtain the nonsuit were regular or not; but was bound to tax the costs to the tenants themselves,

and the demandant must apply to the Court to set aside the nonsuit if irregular.

2. That the rule to discontinue taken out in the cause was no stay of the tenants' proceedings until these costs were taxed and paid, and tenants had a right to consider the same as abandoned.

3. That the affirmative of the issue at *nisi prius* being on the tenants, they would have proved it and taken a verdict, if demandant's counsel had not appeared and taken a nonsuit.

4. If demandant did not pay the costs under the rule, the tenants had a right to have the issue finally disposed of by a verdict, so that they might not be again exposed to failure at a future time when the witnesses were dead ; and demandant could at any time have perfected the stay of proceedings on payment of costs.

5. That under the rule taken out by demandant, the tenants were not bound to sign judgment of *non pros.*, on default of payment of the costs taxed ; and as it was no stay of proceedings until the payment of the costs, the tenants had a right to go on with the trial by proviso ; that the entry of the judgment of *non pros* would have been a barren proceeding, as demandant resided abroad and had no property here.

6. The demandant's counsel having appeared at the trial and accepted a nonsuit, thereby abandoned any rights she had under the rule to discontinue.

7. That a judgment of *non pros* was no bar to plaintiff's bringing another action, whilst a judgment of nonsuit stayed plaintiff's proceedings until defendant's costs were paid.

8. That the Court would not allow a party to take advantage of his own wrong, it being a mere experiment on the part of the demandant in which the tenants were not bound to acquiesce, and as the demandant had a right to discontinue on certain terms, the tenants had a right to proceed if those terms were not carried out.

During the Term, *W. Sidney Smith* shewed cause :— Since the general rule of Hilary Term, 2 Wm. IV., which came

into operation on the first day of Easter Term, of that year, it is not necessary for the defendant to proceed in an action when the plaintiff has taken out a rule to discontinue, which contains the undertaking on the part of the plaintiff to pay the costs and a consent if they are not paid within four days after taxation that defendant shall be at liberty to sign judgment of *non pros*, pursuant to rule No. 106 of those rules. The case of *Edgington v. Proudman*, 1 Dowl. P. C. 152, was decided on the 12th January, 1832, before the new rules came into force. That case decided correctly, according to the then practice, that a rule to discontinue on payment of costs, without the payment of the costs, was no stay of proceedings. The plaintiff had issued and served a rule to discontinue on payment of costs; an appointment was taken out and the costs were taxed, which were not paid, whereupon the plaintiff went on with his action. At the trial the defendant's counsel attended and protested against the cause being tried, and an application was made to compel the plaintiff to enter judgment of discontinuance. The Court held that taking out the rule to discontinue and the taxation of costs only amounted to an offer to do something which was not done, and refused the rule.

But since the new rule the proceedings taken by the tenants were unnecessary, and *Cooper v. Holloway*, 1 Hodges, p. 76, is an express authority that after a rule to discontinue and costs taxed, but not paid, a plaintiff is not entitled to judgment as in case of a nonsuit. *Beeton v. Jupp*, 15 M. & W. 149, may be urged as an authority against this view and as overruling *Cooper v. Holloway*; but there the defendant under his proceedings would have been entitled to judgment sooner than he would under the rule of the plaintiff. In fact defendant was entitled to his judgment in case of a nonsuit on the same day that he was called on to attend the taxation of the costs on the application to discontinue. The proceedings by the tenants to obtain the nonsuit being wholly unnecessary, the Master was quite right in disallowing them: *Dax* Master's Office, 29, 33, 34, 41, 44; *Marshall* on Costs, 238-9, 40.

Curran, contra :—The serving the rule to discontinue was no stay of proceedings and the tenants had a right to proceed to obtain the judgment by the notice of trial. If in that respect their proceedings were irregular, demandant should have moved to set them aside, but having appeared at *nisi prius* and taken a nonsuit, she is now estopped from saying the tenants had not a right to bring her there. The case of *Beeton v. Jupp*, 15 M. & W., already referred to, is an express authority in the tenants' favour, is the latest decided case on the subject, and fully justifies the course taken by them.

RICHARDS, C. J., delivered the judgment of the Court.

I see no good reason for depriving the tenants of the costs incurred in taking the case down to trial by proviso, whereat the demandant was nonsuited. The authorities seem to be express, that serving a rule to discontinue is no stay of proceedings, unless followed by the payment of costs. Here the demandant, after having herself given notice of trial, on obtaining inspection of the deed set up in the tenants' plea, countermanded such notice. Nothing more is done by her for a year or more, when the tenants wishing to bring the case to a close, give notice of trial by proviso, but are obliged to abandon that proceeding because more than a year had elapsed since the last proceeding in the cause. After a second notice of trial by proviso, a rule to discontinue is taken out on the usual terms of payment of costs by the party seeking it; these costs are taxed on the 16th of October, nothing further is done, and on the 29th of October the tenants enter the record for trial, pursuant to notice.

It is urged that the tenants should not have done this, because, under the terms of the rule, they might sooner have obtained judgment of *non pros.*, which would have been of equal service to them. I shall presently have something more to say on this point of entering judgment of *non pros.*, pursuant to the consent in the rule. But supposing a judgment of that sort to be properly entered, is it of the same value to the tenants as a judgment of nonsuit on a record

duly and properly entered for trial? From the facts appearing by affidavit, the demandant has resided out of this Province and probably still is absent therefrom, and it is doubtful if she has any property out of which the tenants could make their costs. The attorney of the demandant seems anxious to preserve her right to prosecute this action, or her claim in it, against these tenants, and for that purpose and with a view of not having her rights prejudiced he attended as counsel at the trial and took a nonsuit. In the event of another action being brought by this demandant against these tenants, if they had but a judgment of *non pros* in this suit, and applied to have the proceedings in the second action stayed until the costs of the former one were paid, they would be met with the answer as laid down in *Chitty's Archbold* (8th ed. 1204), "Such stay will not in general be granted when the first action was not decided on its merits, or when it was *non prossed* or discontinued, or the proceedings set aside for irregularity." I apprehend that on a judgment of nonsuit, obtained after a cause had been entered for trial, the same rule would not prevail.

But the case of *Beeton v. Jupp* (15 M. & W.), reported in 3 D. L. 474, as *Baker v. Jupp*, seems to me to be a case fully warranting the course the tenants have taken here. It was decided in 1846, long after the rule of Hilary Term, 2 Wm. 4.

In that case, the plaintiff having failed to try the cause, pursuant to a peremptory undertaking, on the 10th of January (Saturday), at 12 o'clock, took out and served a rule to discontinue on payment of costs, with an appointment to tax the costs. On the following Monday the defendant obtained a rule absolute for judgment as in case of a nonsuit. On motion for a rule absolute to set aside that judgment as irregular, the plaintiff's counsel, on being called upon to support his rule, argued that the rule having been in the terms of rule No. 106 of Hilary Term, 2 Wm. IV., the defendant obtained an undertaking which enabled him to insist upon the Master proceeding to tax the costs, and if they were not paid, he should have signed judgment of *non pros* ;

that the rule having prescribed the mode of putting an end to the action, the defendant was not justified in taking a circuitous course. [This, I understand, is the ground on which the tenants' costs were disallowed here.] *Platt*, Baron, interposed, saying, "There cannot be a *non pros* after issue joined." Plaintiff's counsel continued the argument by stating that defendant would still have his remedy, as the rule to discontinue contained an undertaking to pay the costs. *Parke*, Baron, said, "There was nothing to prevent the defendant from having his rule absolute for judgment, as in case of a nonsuit. All you gave him was an undertaking, which he was not bound to enforce. Consider how the case stood at the time he moved for judgment. There was a rule to discontinue on payment of costs, and an undertaking to pay them, which the defendant was not bound to accept; therefore he has a right to his judgment." In the report of the case in 15 M. & W. the judgment contains these words, "The defendant was entitled to his judgment as in case of a nonsuit, and was not bound to take instead of it the mere undertaking to pay the costs."

These observations seem strange unexplained, when it appears in the report of the case that the plaintiff consented in the rule that if the costs were not paid within four days, defendant might sign judgment of *non pros*, which would seem to be something more than the mere undertaking to pay the costs. But the observation of *Platt*, Baron, in the report in *Dowling v. Lowndes*, that there could not be a *non pros* after issue joined, shews that the undertaking to pay the costs was what the Court considered the defendant really had. Here the issue was joined, we must assume, for notice of trial was at one time given by the demandant herself, and the cause was also entered for trial by the tenants, and she took a non-suit on the record entered: so, I apprehend, in this case there could not properly have been a judgment of *non pros*.

The judgment entered in this cause, as I understand it, is a judgment of non-suit on the record as entered for trial by the tenants. That judgment has never been moved against,

and until it is it will be assumed to be regular, and the Court awards them the costs of defence in that behalf laid out and expended. The decision of the Master, as I understand it, is that the tenants are not entitled to the costs of their judgment of non-suit, because it was not necessary for them to have obtained such a judgment. That is not a matter, it seems to me, in which the master has any discretion. The general rule is that in the ordinary course of an action the Court awards the costs, the Master only fixes the amount of them. Here, instead of fixing the amount, he decides the tenants are not entitled to them. In this, I think, he is wrong, and the rule in this matter must be made absolute.

A. WILSON, J.—It appears, according to the works of Practice, that the rule to discontinue was rightly issued here. According to the modern practice the defendant can sign judgment of *non pros* if the costs be not paid.

The defendant should not be allowed to pass by this way of terminating the suit, and go on with the proceedings for the mere purpose of terminating them by a nonsuit, which is to be attended with the same results as the judgment of *non pros*, and with no other result.

In this particular case, however, the plaintiff's counsel appeared at the trial and elected to take a nonsuit. After that the plaintiff can hardly be allowed to say that she persisted in her rule to discontinue, and that the nonsuit was improperly obtained. The general practice, it appears to me, is not so plainly with the defendant as is supposed; but the plaintiff has been a party to all that has been done by the defendant, and the nonsuit being regular, the costs of it should be taxed to the defendants.

Per Curiam—*Rule absolute.*

VROOMAN V. VROOMAN.

Ejectment—Bona fides of notice limiting defence.—C. S. U. C., ch. 27., sec. 12
—Practice.

In an action of ejectment defendant appeared and filed a notice claiming title to the possession of the land "mentioned and described in the writ of ejectment summons herein," and after service of issue book and notice of trial, and within four days after appearance, served a notice limiting her defence to all the property mentioned in the writ except a strip on one side thereof, describing it by metes and bounds, two chains in length by *one link* in width. It being too late to serve a fresh notice of trial, plaintiff applied for and obtained a Judge's order to amend the issue book without prejudice to the notice of trial, by adding the usual statement as to a limited defence. Plaintiff went on and took a verdict, though warned by defendant that the Court would be moved to set the order aside. On motion to set aside this order and all subsequent proceedings, *Held*, as it was shewn that there was no question of boundary between the parties, and the notice limiting the defence could not be *bonâ fide*, that after expressly claiming title to the whole of the premises in the notice required by sec. 8 of the Ejectment Act, the Court would not set aside the order of the Judge amending the issue book, as the effect of the amendment was to permit her to set up her defence if it was *bonâ fide*, and if it was not in good faith the Court would not assist her.

The Court declined to decide whether a Judge has power to amend, as was done in this case, where a *bona fide* notice limiting the defence is regularly served after notice of trial.

EJECTMENT for north half of south half, and south half of north half, of lot seven in the sixth concession of Camden.

The plaintiff in his notice claimed possession of the land by virtue of a certain life lease from one William H. Vrooman to him, dated 29th September, 1858, and also as devisee under the will of the said Vrooman.

On the 25th of March plaintiff served issue book and notice of trial for the assizes to be held on the 2nd of April.

On the 26th of March defendant's attorney served a notice on plaintiff's attorney, limiting his defence, as in the head note mentioned.

On the 28th March an order was made by *Hagarty, J.*, that the plaintiff should have leave to amend the issue delivered, by inserting therein and adding thereto that the defendant limited his defence as above stated, without prejudice to the notice of trial already served.

On the 29th of March the defendant's attorney served the plaintiff's attorney with a notice that he would move the full Court during this Term to set aside the order, on the

ground that it was contrary to law and ought not to have been granted ; that he would also move to set aside the said issue book and notice of trial, and also the service thereof on the ground that the issue book was made up and served before the expiration of the four days within which the defendant had a right to serve notice limiting her defence, and before she gave such notice, and that after such service she did give such notice within the proper time, and that such notice was not attached to the issue book when served, nor referred to therein ; and that if plaintiff entered the record for trial at the assizes to be held in the town of Napanee, and proceeded to trial and obtained a verdict in the cause, the defendant would move the Court in Easter Term to set aside the entry of the record and verdict, and all other proceedings.

This notice was served on the plaintiff's attorney on the 30th of March. The plaintiff notwithstanding entered his record at the Napanee assizes, on the 2nd of April, and took a verdict against the defendant for default of appearance.

In the affidavit of the plaintiff's attorney, filed on obtaining the summons to amend the issue book, made on 27th March, 1867, he stated he firmly believed the notice was served for the purpose of rendering void the issue book and notice of trial served, and of throwing the plaintiff over until the next Fall assizes, and if plaintiff was not allowed to amend the issue book and to proceed to trial at the assizes, to be held on the 2nd April, he would be put to serious inconvenience, and that he believed no question of boundary would arise on the trial of the cause.

In the summons for the amendment, the plaintiff also applied to set aside the notice limiting the defence, as trivial and calculated to embarrass and delay the plaintiff.

F. Osler now obtained a rule *nisi* to set aside the order in question, and to discharge the summons on which it had been obtained, on the ground that the order had been improperly made, and should not have been granted after the time for giving notice of trial for the assizes had elapsed, the

notice limiting the defence having been regularly served after that time ; also, to set aside the notice of trial, the entry of the record for trial, the verdict and all subsequent proceedings, for irregularity, on the ground that the issue was made up and served with the notice of trial too soon, and before the expiration of the four days within which the defendant had the right to and did in fact serve a notice limiting her defence as aforesaid, and that no other notice of trial or issue was or could be served in time for the said assizes, and that the defendant had not in fact eight days' notice of trial of the issue in this cause ; also for a new trial, on the ground that no notice of trial of the issue joined had ever been served, or served in proper time before the assizes.

K. McKenzie Q. C., shewed cause :—

By the notice of the defendant, served on the plaintiff on the 23rd of March, she states she claims title to the possession of the land and premises "*mentioned and described* in the writ of ejectment herein," as guardian of the children and heir-at-law of William H. Vrooman, who at the time of his death was the legal owner under a deed from plaintiff. If she had intended only to claim part of the said land she should have stated it in the notice. Having first entered a general appearance, which under the statute would be considered for the whole of the premises mentioned in the writ, she follows that up by stating that she claims title to the possession of the *land and premises mentioned and described* in the writ of ejectment. After thus giving notice of what she claims title to she ought not to be permitted to give another notice limiting her defence, without leave of the Court or a Judge. Suppose she had given a formal notice when serving the notice of claim, saying, I defend for the whole of the land mentioned in the writ and do not limit my defence to any less part of the land therein described, could she within four days serve another notice varying that ? Or, if she had limited her defence to fifty acres and served it, could she within the four days serve another, limiting it to the piece one link by two chains ? Then again, the notice limiting the defence is a

practical fraud on the parties. It is not an honest limiting of the defence, but a mere pretence to throw the plaintiff over the assizes. All that the defendant omits to claim in her notice limiting her defence is a strip of land on the side of the hundred acres claimed of seven inches ninety-two hundredths of an inch wide, and 132 feet long. This piece could not be of any practical use to any one, and on the application before Mr. Justice *Hagarty*, it was sworn there was no question of boundary arising between the parties. On the present application no attempt is made to sustain the limiting of the defence as a *bonâ fide* matter, but it is claimed as a strict matter of right. *Grimshaw v. White*, 12 U. C. C. P. 521, and *Cole on Ejectment*, 134, shew that the course taken by the plaintiffs is the proper one. *Buchanan v. Bettes*, 2 U. C. L. J., N. S. 71, (in Chambers) is certainly against the view expressed in *Cole on Ejectment*; but here the Judge in Chambers might have set aside the notice limiting the defence as irregular and a fraud, and the effect of what the learned Judge did is not more injurious to the defendant than such a course.

Osler, contra.—

The notice of title required by the 8th section of the Ejectment Act is a totally different thing from the notice limiting the defence, to be given under the 12th section of the same statute. The notice served on the plaintiff on the 23rd of March was clearly a notice under the 12th section, and there is nothing in it to deprive the defendant of her right to serve a notice limiting her defence as she is allowed to do by that section. The plaintiff could not be prejudiced in any way by anything contained in the notice served on the 23rd, and therefore cannot say that defendant is estopped from availing herself of her right to limit her defence under section 12. The plaintiff has no right to make up and serve the issue book before the expiration of the four days, for the issue under sec. 16 would require to be made up differently, if there was a notice limiting the defence, from what it would when there was no such notice. This shews the issue ought not to be made up until after the time for giving the notice

limiting the defence has expired. This is the rule laid down in the last edition of *Chitty's Archbold*, 1038, in *White v. Grimshaw*, and *Buchanan et al. v. Bettes*, already referred to, and in *Phillips v. Winters* 10 U. C. L. J, 161; and see also *Cole on Ejectment*, p. 126, 128, 134, and the forms at pp. 732, 733. *Beresford v. Geddes*, L. R. 2 C. P. 285, shews there must be a complete issue on the record before a notice of trial can properly be given.

RICHARDS, C. J. delivered the judgment of the Court.

Whether an amendment of the issue without prejudice to the notice of trial in Ejectment can be properly made for the purpose of inserting in it the limited defence of which notice may be given after the service of the issue and notice of trial, as suggested by Mr. Cole, in his work on Ejectment, at page 134, I shall not now consider myself necessarily bound to determine. When that question comes up clearly on its merits, unencumbered with other questions, I shall feel at liberty to decide it, without regard to the conclusion at which we may arrive in this case.

The first point taken against the defendant is that by the notice given on the 23rd March the defendant in fact did state what land she defended for. She stated she claimed "title to the possession of the land and premises *mentioned and described* in the writ of ejectment summons herein, as guardian of the children who were heirs-at-law of William H. Vrooman, who died legal owner, under a deed of said land and premises from the plaintiff to him.

The 8th section of the Ejectment Act, under which it is said the notice was given, makes it necessary to file a notice with the appearance, stating that besides denying the title of the claimant, the party asserts title in himself, or in some other person under whom he claims, stating the mode in which the title is claimed in the same manner as in the claimant's notice of title. There is nothing in this section requiring the defendant to state the particular portion of the land or premises for which he defends. *Primâ facie* he defends for the whole, unless he limits his defence; and I

see no reason why he may not give notice in fact that he does not intend to limit his defence just as well as to say that he does. As soon as he gives the notice limiting his defence, I don't think he can alter it again without getting consent or leave so to do; and if he gives notice to the effect that he does not intend to limit his defence he may be equally bound by that. The defendant does not in the notice given follow the statute so far as to say that, "besides denying the plaintiff's title, I assert title in myself," but at once notifies the plaintiff that she "claims title to the possession of the land and premises *mentioned and described in the writ of ejectment summons herein.*" I do not think after this the plaintiff was called upon to wait until four days had expired to see if the defendant wished to limit her defence to a portion of the premises less than that "mentioned and described in the ejectment summons." I think the plaintiff was at liberty then to make up the issue and serve notice of trial. If the defendant had not after that served any notice limiting the defence, the issue and the notice of trial would have been perfectly good.

The next step is filing and serving the notice that defendant limited her defence to the whole of the property except the strip one link wide by two chains long. No one can look at this notice and the fact that it is set up in relation to a claim to recover one hundred acres of land, when there is no dispute as to boundary, without becoming convinced that it is not really a notice limiting a defence, but is really a notice that they claim what the defendant said she did in the first notice she gave, viz., the land mentioned and described in the writ. Suppose then the plaintiff had paid no attention to the notice, but had proceeded to enter his record for trial; and then suppose the defendant had applied in Chambers to set aside the notice of trial,—would not the presiding Judge have held that the notice was not a *bonâ fide* notice limiting the defence, but a mere trick to throw the plaintiff over the assizes? and under such circumstances would he not refuse to interfere? If under such circumstances, after the plaintiff had proceeded to trial, the

defendant had moved the Court to set aside the verdict, the same answer, I doubt not, would have been given.

Then, can the fact of the plaintiff, by way of greater caution, having amended the issue served without prejudice to his notice of trial, place him in any worse position than if he had not made any such application? If the defendant cannot be prejudiced by the plaintiff getting the issue amended, I do not think the plaintiff should suffer by such an amendment. What was done was really to put on the record the limited defence which the defendant pretended to set up. If it was honestly put forward, putting it on the record would be just what she would desire. If it was not put forward in good faith, but only to make use of it as a lever to throw the plaintiff over the assizes, then the amendment ought not to prejudice the plaintiff, and we may consider this application as made to set aside the verdict, because plaintiff did not enter defendant's limited defence on the issue and record. It was suggested before the presiding Judge, and is referred to in the affidavits filed on the application before him, that there was no question of boundary between the parties, and the evidence that would shew the plaintiff entitled to some of the land, would shew that he was entitled to the whole, and that the pretended limiting of defence was an imposition and practical fraud on the plaintiff and the Court. This is not met in any way, but by the simple answer, the defendant had a right to serve the notice, and therefore plaintiff's proceedings must be set aside.

Harrison v. Caul (3 F. & F. 277) is a case where the Court went a great way to amend proceedings which might be considered as interfering with the right of a defendant to have the full time for notice of trial after issue joined.

As at present advised I am not prepared, under the state of facts presented in this case, to set aside the order of Mr. Justice *Hagarty*, or the issue and notice of trial, or the verdict herein.

Rule discharged, with costs.

REGINA V. GAGAN.

Conviction for perjury—Evidence.

C. S. U. C., cap. 52, sec. 73, empowers any Justice of the Peace to examine on oath any person who comes before him to give evidence touching loss by fire, in which a Mutual Insurance Company is interested, and to administer to him the requisite oath. The defendant was convicted on an indictment for perjury assigned upon a clause in his affidavit made in compliance with one of the conditions of a policy, issued to him by a Mutual Fire Insurance Company, requiring the assured in case of loss by fire, to deliver into the Company a detailed statement under oath of his loss and value of the property destroyed. The policy of insurance containing this condition not having been produced, *Held*, that although the defendant's affidavit referred to the policy in such a way that its existence might have been fairly inferred, yet the conviction was bad, in consequence of the nonproduction of the policy, which would have shewn the authority of the Justice of the Peace, before whom the affidavit was made, to administer the oath, and also the condition above referred to, of which there had been no proof whatever, although the perjury assigned had been committed in complying with it

The defendant was indicted at the last Spring Assizes at Barrie, before *Hagarty, J.*, for perjury. It appeared that a certain Mutual Fire Association had insured property belonging to defendant and issued a Policy of Insurance, containing, amongst others, a condition that in case of loss a detailed statement under oath of the particulars of the loss and the value of the property insured should be delivered in. A fire having occurred on defendant's premises and destroyed a barn covered by the Policy, defendant appeared before a Justice of the Peace and made an affidavit as to the value of the barn and the contents thereof, the statements in which were proved to have been false.

The Policy of Insurance was not produced by the Crown, but the affidavit on which the perjury was assigned contained such a reference to the Policy as, it was contended, dispensed with its production. Exception was taken by the defendant's Counsel, on this ground, to the case for the prosecution.

The jury returned a verdict of guilty, whereupon the learned Judge, feeling doubt as to the nonproduction and proof of the contract of insurance, reserved the case on this point for the opinion of the Court.

D. McCarthy, Jr., for the defendant, urged the same objections as taken at the trial.

Robert A. Harrison, contra, contended that the reference in defendant's affidavit to the policy dispensed with the production of it, and referred to *Slatterie v. Pooley*, 6 M. & W 664, in support of this position.

J. WILSON, J., delivered the judgment of the Court.

We think the conviction cannot be sustained.

The contract of Insurance between the Company and the defendant was the Policy, the proof of which would have shewed that the Justice of the Peace, before whom the affidavit was made, had authority to administer the oath to the defendant on which the perjury in question was assigned. He had no authority to administer that oath except by virtue of the 73 sec. of the 22 Vic., cap. 52, which gives power to any Justice of the Peace to examine on oath any person who comes before him to give evidence touching any loss by fire, in which any Mutual Insurance Company is interested, and he may administer the requisite oath.

On the authority of *Slatterie v. Pooley*, 6 M. & W. 664, it was contended, on the part of the Crown, that the affidavit itself contained such a reference to the policy as admitted its existence, and so dispensed with its production and proof. From the affidavit produced, it may be fairly inferred against the defendant that a Policy between him and the Company did exist; but can all that is alleged as material in this indictment be inferred from this admission? We think not. Here a condition is set out, and it is averred that in pursuance of it the justice of the defendant's claim was verified by his oath, the oath in question; but there is no proof whatever of this condition. There is, we think, a material link wanting, which the jury could not fairly infer from the other facts proved, and therefore the conviction cannot be upheld.

Conviction annulled.

LEINSTER V. STABLER.

Judgment recovered—Estoppel.

Trespass for breaking and entering the south forty acres of the east half of lot twenty-two. *Plea.* Judgment recovered by the now defendant against the now plaintiff and another in a former action of trespass brought by the now defendant for breaking and entering that part of the half lot *lying north of the south forty acres*, and averring that the trespass now complained of and the trespass complained of in the former action were committed on the same piece of ground; which piece the now plaintiff had contended in the former action formed part of the south forty acres, but which the jury in that action had found to lie north of the south forty acres: *Held*, a good plea by way of estoppel.

Declaration, trespass to the south forty acres of the east half of lot 22, in the 10th concession of Smith.

The defendant's plea sufficiently appears by the head note and judgment.

Demurrer, that it appeared from the plea that the recovery set up by way of estoppel related to other land than that mentioned in the declaration; and that it was attempted to estop plaintiff, not by matter of record, but by the alleged construction put by the jury upon the evidence given at the trial in the plea mentioned.

C. S. Patterson, for the demurrer, cited *Tay. Ev. s. 1507 et seq.*; *Ricardo v. Garcias*, 12 C. & P. 368.

S. Richards, Q. C., contra, cited *Outram v. Morewood*, 3 Ea. 346.

J. WILSON, J., delivered the judgment of the Court.

The defendant should, after the formal statement of a plea in estoppel, have commenced the plea with that part of it with which he has concluded it; that the alleged trespasses in the first count mentioned were committed by the defendant on that part of the east half of the lot lying between the parallel lines, describing the portion as in the plea, and upon no other part whatever of the land in the first count mentioned; and that the defendant brought an action of trespass against the plaintiff and another for breaking and entering that part of the east half, which lies

to the north of the south forty acres, that is to say, for that part of it lying between the two parallel lines, and which the defendant then claimed to lie north of the said forty acres, but which the plaintiff then claimed to be part of the said south forty acres, and which was proved and determined in the said action to be part of the east half of the lot which lies to the north of the said south forty acres, as the now defendant alleged and proved; wherefore the defendant prays judgment if the plaintiff ought to be admitted to allege that the parcel of land so lying between the said two parallel lines is a part of the south forty acres of the said east half lot, or that the trespasses above complained of by the plaintiff and herein pleaded to by the defendant were committed in or upon the south forty acres of the east half of the said lot.

As the plea is at present, the defendant says the plaintiff should not be admitted to say that the land on which the trespasses *complained* of in the first count were committed was the land of the plaintiff, or was the south forty acres of the east half of the lot, which is equivalent to saying that the plaintiff should not be allowed to say that the south forty acres are his property. Now, the plaintiff *complains* of the trespasses being committed *on the whole of the forty acres* and not on any particular part of the land, and it is the defendant's place to limit the generality of the statement, but he must not do so by a reference to what it is the plaintiff *complains* of: unless he use some such language as that he admits it only in manner and to the extent which he admitted it in his plea.

Then all about the plaintiff being seised in fee of *the said* south forty acres, and of the defendant being seised of all the east half which lies to the north of *the said* south forty acres, should be omitted, for it perplexes the plea more than it need do, and leaves it doubtful after all whether the plaintiff in claiming to recover in respect of *the south forty acres of the east half*, is asking anything more than the defendant does in express terms admit to be the plaintiff's undoubted right, and not to be in any manner the property of the defendant.

I think the plea begins by assuming to answer the whole count, and in fact answers the trespasses only to a part. The defendant should not try to conclude the plaintiff from saying that the land on which the trespasses complained of were committed, was the south forty acres, that is to say, the whole of the land in the count referred to, when his defence is restricted only to a small part north of the south forty acres, which he desires to conclude the plaintiff from asserting to be a portion of the south forty acres.

I do not say the plea is bad, for it is afterwards alleged that the trespasses complained of in the first count were committed on the part between the two parallel lines and not on any part of the south forty acres of the east half lot: the defect is in not beginning with that which would have made all clear.

I think the plea shews a good estoppel.

Judgment for defendant on demurrer.

REGINA V. MASON.

Compounding penal action—29 & 30 Vic. ch. 51, sec. 254—18 Eliz. ch. 5 sec. 4.

The defendant was indicted for compounding a penal prosecution instituted by him against one F. under 29 & 30 Vic. ch. 51, sec. 256. It appeared that F. had been convicted under that act on the information of defendant by the Police Magistrate of H., and a fine of \$50 imposed upon him, and that, on an appeal therefrom, defendant for \$10 agreed with F. not to prosecute this appeal, but consented that the conviction should be quashed, which was accordingly done :

Held, that the indictment would neither lie at common law, nor, on the authority of *Rex v. Crisp*, 1 B. & Al. 282, under the 18th Eliz., ch. 5, sec. 4, and the conviction of the defendant was, therefore, ordered to be annulled.

The defendant was indicted at the last Spring Assizes held at Hamilton, before *Hagarty*, J., under the following circumstances :—One George Fredinburg, on the information and evidence of the defendant, had been convicted before the Police Magistrate at Hamilton, of selling spiri-

tuous liquors without license, and had been fined \$50 for the offence. From this conviction F. appealed, but before the appeal was heard the defendant compromised and settled the complaint in question for the sum of \$10, and agreed not to prosecute the trial of it, and consented that the conviction should be quashed without payment of the fine imposed, which was accordingly done.

The foregoing facts having been agreed to between the respective counsel at the trial, the learned Judge directed the jury to find the defendant guilty, and reserved for the consideration of this Court the question whether, under the facts admitted, the defendant had been guilty of a criminal offence.

Robert A. Harrison, for the Crown, cited 29 & 30 Vic., ch. 57, secs. 254, 256, 258; *Rex. v. Crossley*, 10 A. & E. 132; *Rex v. Kilderby*, 1 Saun. 312 a; *Rex v. Sowerby*, 4 T. R. 494; *Rex v. Harris*, Ib. 202; *Regina v. Nott*, 4 Q. B. 768; *Edgecombe v. Robb*, 5 Ea. 294; *Goodall v. Lowndes*, 6 Q. B. 464; *Kerr v. Leiman*, Ib. 308, & 9 Q. B. 371, 394; *Regina v. Harvey*, 14 Q. B. 529; *Collins v. Blanter*, 2 Wil. 341; *Rex. v. Southeston*, 6 Ea. 126; *Best's Case*, 2 Moo. C. C. 124; *Rex v. Crisp*, 1 B. & Al. 282; *Hewson v. Sprange*, 2 Sm. 195; *Brown v. Bailey*, 4 Burr. 1929; *Howard v. Sowerby*, 1 Taunt. 103; *Rex v. Gibbs*, 3 Dowl. 345; *Lee v. Cass*, 2 Taunt. 213.

The defendant was unrepresented by counsel.

RICHARDS, C. J., delivered the judgment of the Court.

By the 254th section of the Municipal Institutions Act of the last Session of the Legislature (29 & 30 Vic. cap. 51), at the latter end of the section, it is enacted that no person shall sell or barter intoxicating liquors of any kind without the license therefor by law required, under a penalty of not less than twenty dollars and costs, and not over fifty dollars and costs.

By the 256th section, all prosecutions for penalties incurred by persons for vending wines, &c., or other spirituous

liquors, and beer, &c., or other fermented or manufactured liquors, without license, *shall be recoverable with costs*, before any two or more Justices of the Peace having jurisdiction in the municipality in which the offence is committed, upon the oath of one credible witness, one-half of which penalty shall go to the informer and the other half to the municipality; but in cities and towns having a Police Magistrate, the offence shall be tried before such Police Magistrate.

I have looked at the cases referred to by *Mr. Harrison*, which establish that when a statute makes that unlawful which was lawful before, and appoints a specific remedy, that remedy must be pursued and no other; and where an offence is not so at common law, but made an offence by Act of Parliament, an indictment will lie where there is a substantive prohibitory clause in such Act of Parliament, though there be afterwards a particular provision and a particular remedy. And it is stated as an established principle, that when a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being a misdemeanour: *Williams Saunders*, vol. 1, p. 138 *b*, notes 4, 9.

In *Rex v. Buchanan* (8 Q. B. 888) Lord *Denman* seems to lay down the rule that a general prohibitory clause supports an indictment, though there be afterwards a particular provision and a particular remedy.

If we assume for the purposes of this argument that which I am not yet satisfied will, on consideration, be found to be the case, viz., that the latter part of the 255th section of the Municipal Institutions Act comes within the rule laid down by Lord *Denman* in the case just referred to, all that is established is that *Fredinburgh*, the defendant, in the proceedings before the Police Magistrate at Hamilton, might have been indicted for the substantive offence of selling spirituous liquors without a license. But that does not shew that by the statute the penalty of fifty dollars and costs

could have been recovered as a penalty except before the Police Magistrate, as provided by section 256. The offence with which Mason is charged in the indictment is compounding a penal action or prosecution that had been instituted; not that he compounded the misdemeanour of selling spirituous liquors contrary to law, which some of the authorities referred to seem to shew that he could not legally do.

Before the Statute of 18th Elizabeth, cap. 5, an informer, who sued on his own behalf as well as that of the Crown, might, I apprehend, have compromised the suit or information without the leave of the Court, at least that part of the penalty going to himself. If he died during the progress of the suit, it would not abate, for the Crown might go on for its share. As to his own share, he might well be considered the actor in that proceeding, for the Crown could not enter a *nolle prosequi* or pardon to deprive him of his share, and the compounding of the action as to his own share would not properly be considered an offence—(see *Hammon v. Griffith*, Cro. Eliz. 584)—and he could not by so doing compromise the share of the Crown. In *Rex v. Leiman*, in Error, (9 Q. B. 380), it is stated, *arguendo*, and not dissented from, that the Statute of Elizabeth was not declaratory, but introduced a new principle.

If this be so, then this indictment will not lie against Mason at common law, but only under the Statute of Elizabeth. The general doctrine is laid down in *Russell* on Crimes, last ed., at p. 197, as follows:—

“The compounding of an information on penal statutes is a misdemeanour against public justice, by contributing to make the laws odious to the people. Therefore, in order to discourage malicious informers, and to provide that when offences are once discovered, they shall be duly prosecuted, the 18th Elizabeth, cap. 5, sec. 4, enacted that when the informer should compound the offence without the consent of the Court, he should stand two hours in the pillory, and be for ever disabled from suing on any popular or penal statute, and should forfeit £10. But this statute did not apply to penalties which are only recoverable by information before

Justices, and an indictment for making a composition in such a case was holden bad, in arrest of judgment, in *Rex v. Crisp* (1 B. & Al. 282). The penalties there compounded for arose under 47 Geo. 3, cap. 68, and were recoverable before any Justice or Justices of the Peace."

I am not aware that this case of *Rex v. Crisp* has ever been questioned, and it seems to settle the law as applicable to the case before us. It was not contended, in argument, that under the 256th section of the Municipal Act the penalties which were sought to be recovered from Fredinburgh were recoverable except by proceedings before the Justices therein referred to, and therefore the Statute of Elizabeth does not apply, and it is not an indictable offence at common law.

Conviction annulled.

CLARKE ET AL., EXECUTORS, V. CARROLL.

Accord—Pleading.

To an action on the common counts by plaintiffs, as executors, defendant pleaded, on equitable grounds, that defendant and testator were partners in the purchase of certain lands in the United States of America, and also in some shares in a certain railway company, for which they were to pay in equal proportions, and were to share equally in the profits and losses; and that being so interested, it was, after the death of the testator, agreed between plaintiffs and defendant that if defendant would assume and pay the calls on the railway shares, take the stock as his own and relieve plaintiffs from all liability thereon, no claim should be made upon him for the balance due on the lands, but that plaintiffs should pay the same, and the payments so made should remain as a first charge upon the lands. The plea then averred performance of the agreement on defendant's part, by assuming the stock, paying the calls and relieving plaintiffs of liability on account thereof, and alleged that the causes of action were for sums paid by plaintiffs, after the agreement respecting said lands:

Held, on demurrer, a good plea, both as a legal and an equitable defence; and that if it was necessary to the validity of the agreement that there should have been a writing, it must be assumed, on demurrer, that there was one.

Declaration on the common counts, accruing, as was assumed, for the fact was not stated in the paper books, to the plaintiffs, as executors,

Plea, on equitable grounds, that in the lifetime of the testator the defendant and testator became partners in, &c., and also in certain shares in an incorporated company, known as, &c., for which they were to pay in equal shares, and were to share equally in the profits or losses derivable or sustainable therefrom; and being so interested therein, it was after the death of the testator agreed between plaintiffs and defendant, that defendant should assume and pay the calls on the said stock and relieve plaintiffs therefrom, and take the said stock as his own absolutely, relieving plaintiffs from all liability in respect thereof, and that in consideration thereof no claim should be made upon defendant in respect of the balance of the payments for said lands, which should be paid up by plaintiffs, and should remain and be a first charge on said lands; and that in pursuance of such arrangement he assumed said stock and paid the calls thereon and relieved plaintiffs therefrom; and that the alleged causes of action in the declaration were for sums paid by the plaintiffs after the last mentioned agreement for and in respect of said lands so purchased in partnership, and which plaintiffs undertook to pay and relieve defendant from, as aforesaid.

Demurrer.—That the plea was not such an equitable defence as could be pleaded.

That the agreement stated was too uncertain for a Court of Equity to decree specific performance of.

That the plea was not a good legal plea, for it admitted the moneys declared for were paid by plaintiffs after the determination of the partnership between defendant and the testator by the decease of the testator, and it did not show any good legal matter in discharge of defendant's liability, by way of accord and satisfaction, or otherwise.

That the plea, if pleaded as an accord and satisfaction, was insufficient, for not shewing performance by the defendant of his part of the agreement, or a good promise or willingness to perform the contract, and being in relation to lands should have been stated to have been in writing.

That the agreement involved the taking of accounts and the execution of deeds for its performance, and was therefore neither a good legal nor equitable plea.

In Hilary term last, *A. Crooks*, Q. C., for demurrer :—

The plea is too vague: it is not stated therein what interest in the lands the defendant was to give to the plaintiffs, and it discloses an arrangement which cannot be fully effectuated at law: *Darling v. Magnan*, 12 U. C. 470; *Fisher on Mortgages*, 360; *Ex parte Hooper*, 1 Mer. 7; *Perez v. Oleaga*, 11 Exch. 506; *Drain v. Harvey*, 17 C. B. 257; *Flight v. Gray*, 3 C. B. N. S. 320.

Burton, Q. C., contra :—

The real engagement is just as set forth: satisfaction or performance has been alleged: nothing further remains to be done; it is therefore a good defence in equity at any rate: *Martin v. Nutkin*, 2 P. Wms. 266.

A. WILSON, J., delivered the judgment of the Court.

The agreement stated in the plea is, that if the defendant would assume and pay the calls on the shares in the Navigation and Railway Company, take the stock as his own, and relieve the plaintiffs from all liability thereon, no claim would be made upon the defendant for the balance due on the pine lands, but that the plaintiffs should pay the same, and the payment so made should remain as a first charge on the lands.

There is nothing but what seems fair enough and reasonable in all this, and the defendant avers that he did assume the stock and has paid the calls thereon and has relieved the plaintiffs therefrom.

There can be no objection to this agreement being a valid one, although it does relate to lands, for these are lands in a foreign country, and if the verbal bargain with respect to them is valid there, it is an enforceable contract here. Nothing has been said as to what is the law of the foreign country, nor has it been shewn that the contract is not a binding one at

that place, and we are not to extend the Statute of Frauds to lands in Michigan, merely because that statute is part of the law of this country.

I think the plea shews a good defence.

In *Cartwright* (Administrator, &c.) v. *Cooke* (3 B. & Ad. 701), George Cooke and John Cooke, brothers, executed an annuity bond, the defendant George, as principal, and the intestate as surety. By an agreement not under seal, these two brothers and Sunderland, a third brother, for the settlement of their affairs and the determination of their mutual claims, made an apportionment of their property and debts among them, and the annuity bond was declared to be the debt of the intestate who had been only the surety. The Court held this to be a good accord as between the parties: the promise of one was the consideration for the promise of the other: each had an immediate remedy upon it against the other, and in this respect falls within the rule in *Comyn*, that an accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance, and therefore the administrator could not recover from the defendant money he had been obliged to pay on the bond for the intestate.

This case relates to houses, cottages, and farms, and to leasehold and fee simple interests, and to various other kinds of property. There was a writing also between the parties as to the accord. There satisfaction was not considered to be necessary; here it may be, there was no writing; but we do not know it, for the plaintiff has admitted that such an agreement was made as the defendant has pleaded, and if there can be legally no such agreement without a writing, this plea will not be proved, for the defendant has undertaken to prove an agreement which he can sustain as sufficient in law: *Solvency Guarantee Co. v. Froane*, (7 H. & N. 5); *Steam Iron Works v. Steam Packet Co.*, (13 C. B. N. S. 358).

On demurrer, therefore, we must presume there was a writing, if it be necessary there should have been one. On this assumption the case just cited shows this to be a good

defence, if it be put on the ground only of an accord with mutual promises.

An accord and satisfaction is also, assumed to be a good defence in equity to a bill for an account filed by one partner against the other : *Brown v. Perkins* (1 Hare, 564), and I do not see why, if this be so, the plaintiff would not be perpetually restrained from reopening these particular transactions.

Upon the whole, I think, the plea is good as an equitable plea, and as a legal plea also, and there should be judgment for the defendant on the demurrer.

Judgment for defendant on demurrer.

CAMPBELL ET AL. V. FOX.

Registry—Defects in registration of titles in County of Hastings—9 Vic. ch. 12, 10 & 11 Vic. ch. 38.

Plaintiffs claimed through A., whose ancestor in 1833 took by conveyance from B., who took by conveyance from the Patentee. These two conveyances were defectively registered. The defendant claimed title through the purchaser from the heir-at-law of B., whose deed was registered, as also that from patentee to B. in 1857 :

Held, that plaintiff's title, if considered un-registered, must prevail, but if defectively registered, such defect was removed by subsequent re-entry under 9 Vic. ch. 12, and 10 & 11 Vic. ch. 38; that this was retro-active, and the plaintiffs had therefore a good registered title.

Ejectment for the west half of lot No. 24, in the 5th concession of Madoc.

Defendant appeared and defended for the south-west quarter of the lot.

The plaintiffs claimed as heirs and devisees of Henry Cassady, deceased, who claimed in possession from the Crown.

The defendant, besides denying plaintiffs' title, claimed title in himself, as tenant at will under William Fox, the elder.

The cause was taken down for trial at the last assizes for

the County of Hastings, before *J. Wilson, J.*, and on the evidence given at the trial of a cause in the Court of Queen's Bench between the above named plaintiff and one William Fox, the younger, it was changed into a special case for the opinion of the Court.

The facts necessary to be mentioned are as follows:—

The Government Patent for the lot issued on the 2nd of April, 1832, to John Lawrence.

On the 3rd of January, 1833, John Lawrence conveyed the whole lot to one Elias Dulmage. On the 15th of January, 1833, Dulmage and wife conveyed the lot with other lands to Henry Cassady, the younger. It was admitted the plaintiffs were the heirs-at-law of Henry James Cassady, deceased, who was the devisee of Henry Cassady, the younger, the assignee of Dulmage.

It was proved that Robert Smith, the Deputy Registrar, on the 6th of April, 1833, signed the usual certificate of registration on the deed from Lawrence to Dulmage (dated 3rd January, 1833), and that this same deed was re-entered in the Registry Office for the County of Hastings, on the 3rd of December, 1866.

It was also proved that Smith had signed a similar certificate, dated 6th of April, 1833, on the deed from Dulmage to Cassady, and this was re-entered for registration on the 3rd of December, 1866, and again on the 8th of March, 1867. In the first certificate of the re-entry of the last deed the date of the first defective registration was erroneously stated as 1863 instead of 1833.

This, as far as material, seems to have been the case for the plaintiffs.

The defendant put in a deed of bargain and sale from John Lawrence to Elias Dulmage, dated the 30th of April, 1832, of the lot in question. This deed was regularly registered, on the 12th of May, 1857, in the Registry Office of the County of Hastings. He also put in and proved a deed, and also the payment of the consideration of \$200, from George B. Dulmage, heir-at-law of Elias Dulmage, to Van R. Knapp, dated the 8th of May, 1857, of the lot in

question and other land. This deed was also properly registered in the Registry Office of Hastings, on the 12th of May, 1857. He also produced a deed from Van R. Knapp to defendant of the south half of the lot, dated the 6th of July, 1860.

A verdict was taken for the plaintiff, subject to the opinion of the Court, whether under the facts and evidence the plaintiffs were entitled to recover.

A. Crooks, Q. C., for plaintiff:—

The ancestor of the plaintiffs having produced the proper documents to the Registrar, is not to be prejudiced by the omissions of that officer. The then owner of the land had no opportunity of knowing whether his deeds had been properly registered or not. The proper officer had certified they were, and he was not bound to go behind that certificate.

The Statutes 9 Vic. cap. 12, and 10 & 11 Vic. cap. 38, continued to the present time, cover the whole case, confirm the defective registry and establish plaintiffs' right to recover. Defendant cannot shew that he is an innocent purchaser, for there must have been a registered title before 1846. If the title under which plaintiffs claimed was a registered title before 1846, it shewed the title out of Dulmage, and therefore the defendant's claim through that channel is not made out. If it was not a registered title before 1846, then under the statute the re-registry makes the plaintiffs' title perfect: *Scott v. McLeod*, 14 U. C. 574; *Doe Pell v. Mitchener*, Dra. 484; *Doe Hennessey v. Meyers*, 2 O. S. 424; *Meeson v. Eastwood*, 4 U. C. 271; *Doe Cronk v. Smith*, 7 U. C. 376; *Doe Brennen v. O'Neil*, 4 U. C. 8; *Doe Prince v. Girty*, 9 U. C. 41; *Doe McLean v. Managhan*, 1 U. C. 491.

Wallbridge, Q. C., contra:—Knapp conveyed to defendant, 6th of February, 1860, who is an innocent purchaser for value, and although the statute extends the time for bringing in the defectively registered deeds, it does not necessarily cut out the title of an innocent purchaser by such subsequent examination and re-entry of a deed.

The first re-entry of the deed from Dulmage to Cassady was defective, and it did not become perfect until the 8th of March, 1867, which was after the commencement of this action.

RICHARDS, C. J., delivered the judgment of the Court.

I fail to see any ground on which the defendant can succeed.

The provision of the Registry Act in force, applicable to the title derived through Knapp, as to the prior registry of the deed from Dulmage conveying the interest in the land which passed to him by the deed of Lawrence, is contained in section 6 of 9 Vic. cap. 34. It gives an election to parties to register deeds, wills, &c., of land after a grant from the Crown, and then declares "that every deed and conveyance that shall *at any time after any memorial is so registered be made and executed* of the lands, &c., comprised in such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such memorial be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." The *deed* under which the plaintiffs claim, made by Dulmage to Cassady, was not made at any time *after* the memorial of the deed vesting the land in Dulmage was registered, but was made even before Cassady himself attempted to register the deed to Dulmage, and twenty-four years *before* Knapp registered the deed to Dulmage under which he claims.

I fail to see how the registry acts then in force postponed the prior deed from Dulmage to Cassady to the subsequent one from Dulmage's heir-at-law to Knapp.

But the provisions made by the Statutes 9 Vic. cap. 12, and 10 & 11 Vic. cap. 38, continued by subsequent enactments, would, it seems to me, make good the alleged defective registry of the conveyance from Lawrence to Dulmage and from Dulmage to Cassady.

The Statute 9 Vic., cap. 12, recites that McLean, Deputy Registrar of the County of Hastings from 1833 to 1844, had in numerous instances neglected to enter memorials of deeds, &c., brought to him for registry, as required by law, but had nevertheless indorsed a certificate of registry in due form on such deeds, and it was necessary to remedy any injury that might arise from such neglect.

The first section required the Registrar to give notice in the *Canada Gazette* and all newspapers published in the County, calling on all persons who might have deeds, &c., on which certificates of registry had been indorsed by McLean, as Deputy Registrar, to produce the same, with a memorial in the form then required by law (except that it need not be signed or sealed by any person), on which memorial should be indorsed a true copy of the certificate on the deed, &c., to which it related.

By section 2, on such production, the Registrar was to compare it with the deed, &c., to which it related, and to indorse on the same the number of the certificate of McLean indorsed on such deed, &c., and on proof of McLean's handwriting to the certificate, and that the copy indorsed on the memorial was a true copy of the certificate, the Registrar was to indorse on any such deed, &c., the words "examined and re-entered," and the date of his making such indorsement, and sign the same.

By section 3, "Every such deed, &c., brought to the Registrar, and indorsed as examined and re-entered, *shall* thenceforth be deemed, held and taken in all Courts and places, and for all purposes, to have been duly registered *on the day and at the hour mentioned* in the certificate of the said Robert C. McLean indorsed thereon," with a proviso as to certificates dated on the same day and hour, and a further proviso that the act should not be construed to divest from any person any estate or interest in lands acquired by such person without notice of a prior defectively registered conveyance thereof, which estate or interest was then vested in any such person under or by virtue of

the provisions of the Registry Act, but such estate so acquired without notice should remain vested as if that act had not been passed.

By section 6 it was declared that it should not be lawful for the Registrar to receive and index any memorial under that act, or to indorse any deed, &c., to which such memorial might relate, in the manner therein authorized, after the first day of January then next (1847).

Provincial Statute 10 & 11 Vic., cap. 38, in the recital, refers to the Statute 9 Vic., cap. 12, states that it was applicable only to defects in registration arising from the neglect of McLean, and that it appeared that like defects had occurred through the neglect of Robert Smith, when Deputy Registrar of the County, and it was expedient to extend the remedial provisions of the act to such cases, and also to extend the period limited by the 6th section of the act for the doing of certain things by the Registrar or his Deputy.

Section 1, &c., then enacted that the Registrar should give similar notice to parties having wills, &c., with certificates of registry indorsed by McLean or by Smith, to produce such deeds, &c., with memorials, same as directed by former act, to the Registrar of the County on or before 1st January then next.

Section 2. On proof of Smith's signature in like manner as McLean's to certificate, all the provisions of the recited act were to extend to the certificates granted by Smith, and to the memorial deed, &c., to which it related, in the same manner, and with the same effect as to the certificates of McLean, the memorials on which they were indorsed and the deeds, &c., to which they related, and the Registrar was to have the same rights and duties with regard to them.

Section 3. Registrar not to receive and index any memorial under that act, or to indorse any deed, &c., to which any such memorial relates, after 1st January then next, (1848).

Section 4. The period limited by sec. 6 of the former act, within which the Registrar could receive and index memorials,

and to indorse any deed, &c., by virtue of the former act, was to extend to the 10th. January then next (1848), as if such day had been mentioned in the section. There was also power given to the Governor in Council to extend the time to 1st July then next, but no longer.

The period for receiving and indexing the memorials, and indorsing the deeds to which they relate, has been extended from time to time, by the statutes to continue expiring laws, and by 29 and 30 Vic. Cap. 14, to the 1st day of January, 1867, and then until the end of the next ensuing session of Parliament and no longer.

The object of extending the period by the Legislature must have been to permit parties to avail themselves of the provisions of the two statutes to make good the prior defective registration, when the memorials have been received and indexed, and the deeds endorsed as "examined and re-entered." By force of the statutes, the deeds, &c., are to be deemed taken and held for all purposes, to have been duly registered on the day and at the hour mentioned in the certificate endorsed thereon by Smith and McLean, respectively.

When the deeds from Lawrence to Dulmage, and from Dulmage to Cassady, under which the Plaintiffs claim, were produced at the trial, they were indorsed as examined and re-entered as required by the statute, and under the statute we are bound to hold that they were duly registered on the 6th day of April, 1833, according to the certificate of Robert Smith the Deputy Registrar, indorsed on each of the said deeds respectively. This being so, the title under which the Plaintiffs claim is prior in time and prior in registry, and must prevail.

The Postea will be delivered to the Plaintiffs.

Postea to Plaintiffs.

LYNCH V. BICKLE.

Similarity of counts in declaration—Election—Trespass—Wrongful continuance in possession—Distress for rent—Time of sale—Misdirection.

The declaration contained three counts; the first, trespass for breaking and entering plaintiff's store and taking his goods; second, trespass to plaintiff's cattle, goods, &c.; third, *case* for distraining on plaintiff's premises, for rent due defendant by plaintiff's immediate landlord, goods of much greater value than the amount of rent, &c:

Held, that plaintiff was not bound to elect at the trial upon which count he would go to the jury, although the three counts were founded on one and the same wrong.

Held, also, that plaintiff was entitled to maintain trespass for a wrongful *continuance* in possession beyond the time he was reasonably authorized to keep the same.

In the case of distress for rent there must be five clear days between the day of distress and the sale, at the expiration of which time the landlord is *at liberty* to proceed and sell; but he is not *obliged* to sell and proceed with the sale, nor is he bound to begin to dispose of the distress on the sixth day, but has a reasonable time after the five days so to do; and what is a reasonable time is a question for the jury under all the facts of the case. In this case, therefore, the Judge having directed the jury that the landlord was bound to proceed to sell on the sixth day, *held*, that the direction was improper, and that the right direction would have been, after having told the jury the time when the goods could first have been sold, for them to find whether under all the facts disclosed the defendant had remained an unreasonable time in possession after the expiration of the five days before selling the goods.

The declaration contained three counts:

1st. Trespass in breaking and entering the plaintiff's store and taking his goods.

2nd. Trespass to the plaintiff's cattle, goods, and merchandize.

3rd. Case for distraining on the plaintiff for rent due to the defendant by one Jacob Stalter, his tenant, under whom the plaintiff held as tenant to Stalter, goods of much greater value than the amount of the arrears and charges of distress, appraisement and sale, although part of the goods was then of sufficient value and might have satisfied the same, and might have been distrained therefor, and the defendant then made an excessive and unwarrantable distress for the said arrears, contrary to the statute.

Plea, to 1st and 2nd counts—Not guilty by statute, 11 Geo. II., ch. 19, sec. 21, (public act).

Plea, to 3rd count—Not guilty.

The cause was tried at the last assizes, at Whitby, before *J. Wilson, J.*

The evidence is not very material: it shewed that Stalter owed the defendant, in October, 1866, two years' rent, amounting to \$1,200, and that the distress was made for this amount both upon Stalter and the plaintiff. The plaintiff had paid his rent to Stalter. All the plaintiff's goods, valued at about \$2,500, in his shop, were distrained, and a man kept in possession for thirteen days. That portion of them, which was sold for \$208, was valued by his own witness at \$385 only. The appraiser's valuation was \$468. The verdict of the jury seemed therefore governed by the difference between the appraisement and the sale.

It also appeared that after the distress the defendant, at Stalter's request, agreed to wait upon him for \$300 of the rent, so that the amount to be made was only \$900. Of this sum about \$773 was made out of Stalter's goods and \$208 out of the plaintiff's. It appeared also that the defendant bought in Stalter's goods, and left them with him, and that he continued to use them; that the defendant bought some part of the plaintiff's goods which were sold, and that Stalter took them from the plaintiff's shop to the premises in Stalter's possession, and used them as his own.

At the close of the plaintiff's case it was objected that there was no evidence to sustain the third count; no lease or evidence of a tenancy between the defendant and the plaintiff, or of rent due; that a sub-tenant had no right to maintain an action against the landlord-in-chief for an excessive distress; that the plaintiff was not entitled to any damages on the trespass counts, and that he should elect on which count he would proceed.

The plaintiff declined to elect, and the learned Judge ruled that he was not obliged to do so.

At the close of the case the jury were told that if rent were due to the defendant, as landlord of Stalter, this plaintiff could be distrained on for it; that the landlord must sell on the sixth day after the seizure and proceed with the sale; and they were told what would constitute an excessive

distress. They were asked to say whether there was rent in arrear, and if there was, the defendant had the right to distrain ; if there was not, he was a trespasser. They were also directed to consider whether the defendant or his bailiff remained an unreasonable time after the sixth day in possession ; if so, that was a trespass for the time beyond that day.

The defendant's counsel objected to this direction ; that the jury should have been told the landlord was not bound to sell on the sixth day ; that he was allowed a reasonable time after that day for the purpose ; that the jury should not have been told there was evidence that the defendant was a trespasser for the two days he kept the goods after the sale of Stalter's things ; that the jury should not have been told that a man who seizes for \$1,200 and takes \$900, may be reasonably held to have been entitled to only \$900 at the first.

The learned Judge noted that he had explained to the jury that the landlord was bound to begin to sell on the sixth day, and to continue the sale within a reasonable time thereafter, and that he then called the jury back and explained that what he meant was, that the landlord was bound to begin to dispose of the distress on the sixth day.

The defendant's counsel still objected to the charge, and contended that the jury should be told the landlord had a reasonable time after the sixth day.

The jury found a verdict on the whole record for the plaintiff, with \$275 damages.

In Easter Term last, *R. A. Harrison* moved for a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial granted, on account of the misdirection of the learned Judge who tried the cause, in ruling, 1st, That although the three counts in the declaration were founded on one and the same wrong, the plaintiff was not bound to elect. 2nd. That the plaintiff could sustain the first count, although the entry was lawful, and all that was proved was that the defendant remained longer in possession

than was necessary. 3rd. That the plaintiff, although a sub-tenant, could, under the statute of Marlebridge, maintain the third count. 4th. That a landlord who makes a distress for rent, is bound to proceed to sell on the sixth day after the distress. 5th, That if he do not do so, he is a trespasser. 6th. That for two days at least the defendant was a trespasser. 7th. That as a matter of law if a man distrain for \$1,200 and afterwards desist upon making \$900, he should be held to have had the right to distrain for \$900 only, whereas a tenant or sub-tenant, whose goods have been distrained, cannot in respect of the same distress maintain trespass for the distress as unlawful and case for excessive distress for remaining in possession after the time allowed by law where the distress is rightful, since the statute 11, Geo. II., ch. 19, sec. 19, only gives an action for damages where special damage is proved; a sub-tenant cannot maintain case for an excessive distress; a landlord is allowed a reasonable time after the five days to appraise, advertise, and proceed to sale of the distress; and the question of reasonable time is, in such case, for the jury and not for the Judge; and the subsequent desistment before the whole distress was realized, was, at most, evidence of a distress for more rent than was due, and as to which there was no count for it, and for which without more an action would not lie.

Or, why the verdict, being general on inconsistent counts for the same wrong, and the portion applicable to each not separated, should not be set aside and a new trial had; or why the verdict should not be set aside, as contrary to law, evidence, and the weight of evidence, on some or other of the grounds aforesaid; and for excessive damages.

M. C. Cameron shewed cause:—

As to what a count for an excessive distress should state, see *Tancred v. Leyland*, 16 Q. B. 669; *Lucas v. Tarleton*, 3 H. & N. 116, and 121 per *Watson*, B.

The remaining in possession beyond a reasonable time will constitute a trespass, and the defendant did remain in pos-

session more than a reasonable time : *Winterbourne v. Morgan*, 11 East. 395 ; Woodf. L. & T. 9th ed. 773-8.

The appraisers must be reasonably competent, and so they were : *Roden v. Eyton*, 6 C. B. 429, per *Wilde*, C. J. ; and as to the action not lying by a sub-tenant against the head landlord, the case of *Bail v. Mellor*, 19 L. J. 279 ; shews it will lie against the landlord, even at the suit of a stranger.

Harrison, contra, after abandoning this point, and referring to *Huskinson v. Lawrence*, 26 U. C. 58 ; and *Priest v. Keen*, 4 H. & N. 236 ; as also applicable to it, continued :

The distress was not for more rent than the goods sold were worth, and all the rent was due for which the sale was made.

The 2nd of November was the first day the defendant could have made preparations for a sale, by making the appraisement. On the 3rd of November he did appraise and sell Stalter's effects, from which he made \$774. The sale of the plaintiff's things was adjourned to the 7th of November, when they were sold at a little more than \$208. Trespass either to the realty or rersonalty is not maintainable for merely *continuing* in possession too long a time : the action must be case under the 11th Geo. II. for the special damage, the original entry having been lawful.

The jury have given \$275 damages for only two days' delay in selling the plaintiff's goods : the evidence shewed that his shop was taken possession of by the bailiff, at his own request, because he was doing nothing : he was daily losing money, and was about to close his shop altogether and leave the country.

There was no evidence of an excessive distress : the whole shop of goods was not seized, although the bailiff was in possession of the shop. The only goods of the plaintiff that were sold amounted to \$208, and his own witness valued them at only \$385 : this was not an excessive taking.

The mere fact of the defendant forbearing to make the whole \$1,200 due to him for rent was not properly even evidence, as it was put to the jury, that he had not originally had a larger claim than \$900 for rent ; and the learned

Judge was wrong in telling the jury the defendant was bound to sell on the sixth day, or even to begin to dispose of the distress on the sixth day. The direction should have been that the defendant had a reasonable time after the expiration of the five days within which to sell the goods: *Pitt v. Shew*, 4 B. & A. 206; and this reasonable time should have been expressly left to the jury, *Ibid.*; *Taylor Ev.*, 4th ed., 48.

A. WILSON, J., delivered the judgment of the Court.

The case will be more conveniently disposed of by taking up the different exceptions as they are stated in the rule.

The plaintiff was not bound to elect at the trial on which count he would go to the jury: *Ruthven v. Stinson* (14 C. P. 181); *Haacke v. Adamson* (14 C. P. 201).

The plaintiff is entitled to maintain trespass for a wrongful *continuance* in possession beyond the time he was reasonably authorised to keep possession: *Winterbourne v. Morgan* (11 East 395); *Ladd v. Thomas* (12 A. & E. 126, per Lord Denman, C. J.)

The point as to the right of the plaintiff, as sub-tenant, to maintain the action was given up by the defendant's counsel.

The point relating to the sale on the sixth day, or beginning it on the sixth day, we shall dispose of lastly.

We think it is a matter of evidence, if it be in dispute whether \$900 or \$1,200 was the sum due for rent, that only \$900 was due; that the landlord could have made the whole \$1,200 if he pleased, and he stopped short after making \$900.

Stalter, the original lessee, swore he owed the two year's rent, amounting to \$1,200, and he explains how and why it was the defendant did not proceed to make more than the \$900; that is, because the defendant, at Stalter's request, agreed to give Stalter time for the difference of the \$300 and not look to the plaintiff's goods for it; but from the understanding between Stalter and the defendant in making the distress upon the plaintiff and upon Stalter himself at the same time,

and the arrangement implied between them, from the fact of leaving all Stalter's goods in his possession notwithstanding the sale, and Stalter removing those goods of the plaintiff's which were sold, and which were brought by the defendant to Stalter's own place, the jury may have thought there was too much of concert between these two, for the express purpose of making the plaintiff pay when he personally was not in default, and so they may have doubted whether, as the defendant had been quite willing to go so far as to distrain on the plaintiff and to take possession of his shop, and to sell some portion of his goods, he would have hesitated to go on with the sale and make the sum of \$300 more, if it had been really due to him.

The sum is only material in this action as determining whether the rent that was due was \$300 more or less, and even if it be taken to have been the greater sum in favour of the defendant, it cannot make much difference, for the complaint is that \$2,600 worth of goods in the shop were distrained upon, and whether the rent due be \$900 or \$1,200 will not very materially be influenced by the fact that it was the greater and not the lesser sum which the landlord was entitled to.

We are not disposed to place much consequence on this objection in any view of it.

We see nothing in the evidence which could justify us in interfering on this point: it was peculiarly a case for the jury: there was much open to comment, and much which required explanation, and much which, we think, was explained, and, when explained, was not to the disadvantage of the defendant. Yet the whole case had to be considered by the jury, and they may have drawn more unfavourable conclusions against the defendant than another jury might have done; but we cannot say that in doing so they have decided contrary to the evidence.

The only remaining point is that which relates to the sale on the sixth day.

A distress made on the 25th of October cannot be sold till the 31st of the month: the day of seizure is to be

excluded. Then there must be five clear days, and after that the landlord is at liberty to proceed and sell: *Robinson v. Waddington* (13 Q. B. 753.)

In this case the plaintiff got his warrant to distrain on the 25th of October, but the precise day he distrained does not appear. The bailiff says he kept possession for thirteen days, and he sold on the 7th of November; so he may not have distrained until the 26th of October.

Assuming this to have been so, then the landlord could proceed to sell on the 1st of November, but not before.

He did sell Stalter's good on the 3rd of November, a Saturday, and he sold the plaintiff's on Wednesday and Thursday following, which would be the 7th and 8th: the bailiff says he sold the plaintiff's things on the 7th.

During all this time the bailiff had the shop locked up, but, as he says, this was at the plaintiff's desire. Probably the distress was made on Stalter the same day it was made on the plaintiff, as the seizure was made under the same warrant and they both reside on the same property. If so, the proceeding to sell Stalter's goods on the 3rd of November, when the sale might have been begun on the 1st of the month, or rather when *proceedings* to have a sale might have been begun on the 1st, was, perhaps, not an unreasonable delay, and it was perhaps reasonable, as Stalter was the principal debtor, that his goods should have been sold before the goods of the plaintiff were put up, and proceedings stayed against the plaintiff in the meantime: *Fisher v. Algar* (2 C. & P. 374). And as Stalter's sale was on a Saturday, the 3rd, the plaintiff's sale could scarcely have been held before the following Monday, the 5th. Instead of this the sale was not till Wednesday, the 7th. Was the defendant obliged to begin his sale, or his proceedings for a sale of the plaintiff's goods on the 1st of November? or was he allowed a reasonable time after the expiration of the five days to do so?

In *Pitt v. Shew*, before mentioned, the landlord distrained on the 14th of April, and he did not sell till the 27th of the month. The tenant brought trespass for breaking and

entering his store and taking his goods, and he contended that the defendants had remained upon the premises for too long a time, and that they should immediately after the expiration of the five days from the time of the distress taken have appraised and sold the goods. The Court said: "It was lawful for the landlord and those acting under him to remain more than five days upon the premises for the purpose of selling the goods distrained. By law he could not sell till five days had expired, and taking the two acts together it is clear that it must be left to the jury to say what is a reasonable time after that period within which to sell the goods; and the jury in this case having found that the defendants had sold within a reasonable time, there is no ground for disturbing the verdict."

Griffin v. Scott (2 Ld. Ray 1424) is to the same effect.

The landlord was not obliged then to sell on the sixth day after the seizure and proceed with the sale; nor was he bound to begin to dispose of the distress on the sixth day, and a direction to that effect was not, we think, exactly the proper one. The question was, whether the landlord was a trespasser by continuing an unreasonable time in possession after the expiration of the five days; and the jury should, after having been told the time when the goods could first have been sold, have been asked, under a consideration of all the facts relating to the double seizure and sale of Stalter's and the plaintiff's goods, to say whether they thought the defendant had remained an unreasonable time in possession of the shop and goods after the expiration of the five days before selling the goods. But putting the case to them as it was, was putting it too closely for the landlord, and it was submitting to them the Judge's view of what was reasonable time in this particular instance, instead of leaving it to the opinion and discretion of the jury to say whether *they* thought the time reasonable or not.

All this was applicable to the trespass counts, and we have hesitated notwithstanding what we have said respecting the direction to the jury, whether we could properly entertain the application to set aside the verdict; because the

learned Judge did expressly leave it to the jury to say "whether the defendant or his bailiff remained an unreasonable time after the sixth day in possession;" and they were told properly, "if so, that was a trespass for the time beyond that day:" so that here was a proper direction given to them upon this very point, in words at all events; and if it had appeared that this language had or could have had its full effect without relation to what had been said about selling or proceeding to sell on the sixth day, we should not have interfered with the verdict; but we think that after what was said the jury may have found the mere fact of not selling on the sixth day, or beginning to sell on the sixth day, was of itself a culpable and unreasonable delay, rendering the party liable as a trespasser for his assumed default.

We regret this, for we are satisfied the damages were given entirely on the count for the excessive distress, and the finding on that count stands free from all objection.

If, however, the plaintiff will consent to a verdict being entered for the defendant on these two counts, and will restrict his verdict to the third count, [if the learned Judge is of opinion he could properly order it to be so limited by his notes, and we understand he is of that opinion,] then, we think, the rule should be discharged without costs.

If the plaintiff decline to accept of this, the rule will be absolute.*

* The plaintiff having afterwards agreed to confine his verdict to the third count, and to reduce his verdict to \$260, the rule was discharged, without costs.

MILLER V. STITT AND MCINTYRE.

Ejectment—Covenant to stand seised—Conveyance by Sheriff out of office—Estoppel in pais—C. S. U. C. ch. 22, sec. 269.

In ejectment plaintiff claimed under a sealed instrument executed in his favor by one M., and witnessing that in consideration of prior indebtedness for professional services, and to secure plaintiff for future services of the same kind, *and of the sum £25 already paid and advanced by plaintiff to him, &c.*, he, M., covenanted, granted, and agreed that he would *stand seised and possessed of the land in question, to the use of plaintiff, his heirs, and assigns, by way of charge, security, and mortgage on the land, for said moneys and costs; and when plaintiff's costs were taxed, he was to be at liberty to hold the instrument as and by way of a charge, mortgage, and security upon the land for the amount so to be ascertained, or M. would; and he covenanted that he or his heirs would, on demand, execute a good and sufficient mortgage in law, with bar of dower, if necessary, and usual covenants, &c.*: *Semble*, that the instrument was not void for champerty or maintenance; and *Held*, that it could only operate under the Statute of Uses, as being granted on a money consideration, which appeared from the express recitals contained in it; and *Semble*, that full effect would be given to the whole instrument and the real intent of the parties carried out by holding that it was to operate as a charge, security, and mortgage in equity on the land until plaintiff's claim was ascertained by taxation, and so continue as an equitable charge, unless plaintiff desired a legal mortgage, which in that case M. covenanted to execute. *Quære*, whether plaintiff took the legal estate, so as to enable him to maintain ejectment.

The land in question was brought to sale by the Sheriff under several executions against M., one of which was issued by a client of plaintiff. Plaintiff's agent attended and bid at the sale, and the land was knocked down to him at the price offered, being sufficient to cover the amount of the execution. The defendant McIntyre also offered the same price. Before the completion of the sale, however, plaintiff notified both his agent and the Sheriff that an injunction had been ordered by the Court of Chancery to issue restraining the sale, and that if the same were carried out he would apply to set it aside. This notice was followed by one from plaintiff's agent to the Sheriff, to the effect that the latter was at liberty to convey the land entered in his name at the sale to any person he thought fit, as he relinquished all claim and interest therein. The Sheriff accordingly, upon the injunction being subsequently dissolved, conveyed the land to the defendant McIntyre for the price bid by him at the sale:

Held, that in the absence of any evidence to the contrary it must be assumed the Sheriff had proceeded regularly in conveying the land to McIntyre, and that no one appearing to be prejudiced by the transfer, the Court was bound to uphold it. *Held*, also, that taking all the facts together—that it was the means by which his client had obtained satisfaction of his debt, and that it was made under the express authority of his agent, and so under his own authority,—plaintiff could not be heard to impugn the conveyance to McIntyre.

Held, also, that the deed in question, having been executed by the Sheriff out of office, but in completion of the sale made by him whilst in office, was valid under sec. 269 of C. S. U. C. ch. 22.

EJECTMENT for part of lot No. 14, in the 1st concession of Blenheim, in the County of Oxford, and the east half of the south-west quarter of lot 14.

The defendants appeared and defended for the whole of the land mentioned in the writ.

The plaintiff in his notice claimed under an indenture, dated the 20th day of February, 1861, made between James Henry Madden and the plaintiff.

The defendants by their notice claimed title in themselves, as follows: "That the said James Henry Madden, being the owner in fee of the said lands, the Sheriff of the County of Oxford, under certain executions against the lands and tenements of the said James Henry Madden, on the 10th of March, 1864, by deed, as such Sheriff, sold the said lands under such executions to the defendant, John McIntyre, who on the 21st day of June, 1866, sold the said lands to the defendant, James Stitt, who on the last named day mortgaged the same in fee to the said John McIntyre; and the said James Stitt claims title to the said lands under said conveyance, subject to said mortgage, and the said John McIntyre as such mortgagee."

The cause was taken down to trial at the fall assizes for the County of Oxford, for the year 1866, held before *A. Wilson, J.*, when a verdict was entered for the defendant by consent, with leave to the plaintiff to move to enter a verdict for him, if the Court should be of opinion that he was entitled to succeed.

The evidence given at the trial shewed that one Henry Madden was the owner of the premises in question. He had had a mortgage on them, which had been foreclosed through one Edward Blevins, his solicitor. In November, 1856, Madden was convicted of bigamy, and sentenced to two years imprisonment in the Provincial Penitentiary. Before the 9th of October, 1856, and shortly before the sitting of the Court at which he was convicted, he gave a confession of judgment for £75 to Edward Blevins, in the Court of Queen's Bench, to cover the amount of expenses attending his defence on the charge of bigamy, and for the costs of foreclosing the mortgage. On this confession judgment was entered up in favor of Edward Blevins for £78 12s. 11d., on the 29th of October, 1856. He also gave a power of attorney to William Hager Landon

before he was sent to the penitentiary, and authorised Landon to manage his affairs generally, and to sell his real and personal estate. Under this power of attorney, before his term of imprisonment had expired, Landon gave Edward Blevins a mortgage on the land, dated 14th of September, 1858, to secure him (Blevins) in £309, payable on the 11th of September, 1859. In addition to that Blevins obtained a judgment against Madden for £128 15s. 5d. on a confession, which judgment was entered up on the 15th of August, 1857.

On the 19th of June, 1858, Charles Coote recovered a judgment against Blevins and Lee in the County Court of the County of Oxford, for £43 7s. 2d. On the 29th of July, 1859, he obtained an order from the Judge of the County Court of the County of Oxford, garnisheeing the debt due from Madden to Blevins, or so much thereof as was necessary to satisfy his claim, and on the 6th of August, 1859, a writ of execution was duly issued against Madden in favor of Coote to levy the moneys, with costs, &c.

John McIntyre, one of the defendants in this action, on the 31st May, 1859, also recovered a judgment in the County Court of Oxford against Blevins for £56 10s. 6d., on which garnishment proceedings were also taken to have the same paid out of the debt owing by Madden to Blevins, and on the 9th of February, 1860, a writ was issued on the proceedings to levy the moneys, together with costs, Sheriff's fees, &c., from Madden.

On the 3rd of November, 1860, Blevins sued Madden on the covenant contained in the mortgage, to recover the £309, with interest, and also the amount of the two judgments recovered against him on the confessions of judgment already mentioned. In this last suit he failed to recover the amount of money payable by the mortgage. Madden set up the garnishment proceedings in bar to the action on the two judgments, but his pleas being demurred to were held bad, and Blevins got another judgment against him, which was entered up by John Blevins, as administrator of Edward, who had died in the meantime. The judgment was entered the 9th of July, 1861, for £245 11s. 5d.

Messrs. Read & Leith, James Ross, and Robert Watkins, also obtained judgments against Edward Blevins, and registered them in the registry office of the County of Oxford.

On the 6th of August, 1859, Coote, by the present plaintiff, Miller, as his attorney, issued a *fi. fa.* against goods on the garnishment proceedings against Madden, which was returned *nulla bona*. On the 30th of August of the same year, and on the same day, a writ of *fi. fa.* against Madden's lands was issued to the Sheriff of the County of Oxford for £43 7s. 2d. On the 31st August, 1861, the Sheriff returned that he had seized the lands of Madden of the value of five shillings, which he had on hand for want of buyers, and on the same day a *ven. ex.* and *fi. fa.* residue issued.

In McIntyre's proceedings against Madden an issue was taken, and judgment was finally, on the 25th of January, 1860, recovered against Madden for £75 17s. 7d. On the 9th of February he obtained a *fi. fa.* against goods, which was returned, on the 13th of February, *nulla bona*. On the 8th of March, 1860, a *fi. fa.* lands was issued to the same Sheriff. On the 31st of August, 1861, this was returned "lands on hand of the value of five shillings", and on the same day a *ven. ex.* and *fi. fa.*, residue was placed in the Sheriff's hands.

In *Coote v. Madden* the lands were advertised on the 11th of July, to be sold on the 11th October, 1860.

In *McIntyre v. Madden*, and two other suits, the lands were advertised on the 14th of May, 1862, to be sold on the 21st of August, 1862.

The sale on Coote's execution was postponed at the request of Miller and his client, and in October, 1862, the land was sold by the Sheriff, and knocked down to one Grey for £225. McIntyre, one of the defendants, also made the same bid. Grey bid at the sale on the part of the present plaintiff, who asked him (Grey) to bid for him, but in his (Grey's) own name. A few days after he bid off the property Grey declined to carry out the purchase, in consequence of a notice received from Miller, and an injunction in Chancery, which Miller shewed him.

Sometime prior to the 13th of May, 1862, Madden had filed

a bill in Chancery against John Blevins, Alexander Leith, David Breakenridge Read, James Ross, Charles Coote, John McIntyre, and Robert Watkins, the defendant, John Blevins, having been appointed administrator to the estate of Edward Blevins, and the other defendants being execution creditors of the same, who had registered their judgments, and Coote and McIntyre being judgment creditors of Madden by virtue of the garnishment proceedings, and having their executions against Madden's lands then in the Sheriff's hands.

By that bill Madden prayed, amongst other things, for an injunction against Coote and McIntyre to restrain them from enforcing their attaching orders, or writs of *fi. fa.* against his lands, as the Court might direct; to restrain John Blevins from selling or conveying the mortgage and judgments which Edward Blevins had obtained, or proceeding to enforce the same, or enforcing the judgment in the action at law on the mortgage and judgments; that the mortgage might be declared fraudulent and void, and released and discharged, and be given up to be cancelled; that the judgments obtained by Edward Blevins might be declared void and discharged; that an account might be taken of the dealings between Edward Blevins and himself, and if he (Madden) was indebted to Edward Blevins in any sum of money, that the rights of the several defendants in the bill might be declared; that, on payment of what was due, Coote and McIntyre might be ordered to withdraw their *fi. fas.* against lands, and writs of *ven. ex.* thereon.

On the 13th of June, 1862, the Court of Chancery, on the hearing, declared that the judgments by confession of Edward Blevins against the said Madden were open to enquiry, and were not to bar an account between Madden and the estate of Edward Blevins; and Madden having brought £52 4s. 2d., into Court, being the amount of an execution recovered by Coote in the garnishment proceedings, the Court directed a reference to the Master to take an account between Edward Blevins and Madden, to inquire what, if anything, was due at the time of the serving of the attachment order by

McIntyre from Madden to Edward Blevins, the judgments by confession to stand as security for the amount which might be found due, and an injunction was ordered restraining the defendants in that suit, including *Coote* and *McIntyre*, from proceeding on the execution at law, upon the garnishee order, and all proceedings at law against Madden, in respect of the judgments against Edward Blevins.

On the 11th of October, 1862, Miller, the present plaintiff, (who was probably the solicitor for the plaintiff in the bill filed in Chancery), as attorney for Madden, notified Grey and the Sheriff of the County of Oxford, that since the sale of lands in the suit of *Coote v. Madden* and *McIntyre v. Madden*, at which sale Grey was the purchaser, he had been informed by his Chancery agent in Toronto that in the suit then pending in Chancery, in which *McIntyre* and *Coote*, with others, were defendants, the Court previous to the sale had ordered a writ of injunction to issue to restrain the said sale; that he had sent for a copy of the decree or order, which he would serve as soon as he received it, and in the meantime, as attorney for Madden, he notified them not to complete or further carry out the sale, for if they did so, he would move the Court to set it aside.

A copy of this notice was served on Grey on the 13th, and on the Sheriff on the 14th of October, 1862.

The writ of injunction did not appear to have issued until the 2nd of January, 1863, and was served on Coote and Sheriff Carroll on the 6th of January.

On the 1st of September, 1863, the Chancery suit again came up on the report of the Master, made on the 8th of June, 1863, and the Court ordered the bill of the plaintiff Madden to be dismissed with costs, as to Coote, McIntyre, and Robert Watkins, without prejudice to the order made to pay out to the defendant McIntyre the money paid into Court in the cause, and the Court further ordered the mortgage to be given up, and the injunction granted to be dissolved.

On the 14th of April, 1863, the sum of £53 paid into Court, and the interest accrued thereon, were ordered to be

paid to John McIntyre towards the satisfaction of his judgment.

On the 13th of December, 1862, Grey, the person to whom the land had been knocked down at the Sheriff's sale, addressed a note to the Sheriff to the following effect: "In the case of *Coote, McIntyre et al v. Madden*, you are at liberty to convey the land sold by Sheriff's sale in the above case and entered in my name, to any person or persons you may think fit, as I hereby relinquish all claim and interest to the said lands. (Signed) M. GREY."

An indenture, dated the 20th February, 1861, and registered on the 22nd day of the same month, made between Madden, of the one part, and the plaintiff of the other part, was given in evidence. It recited that the plaintiff had done certain legal business at law and in equity for Madden, who was indebted to him in certain moneys, in respect of the performance of the said business, and certain other legal business was required to be done and performed for the said Madden by the plaintiff, and Madden was desirous of securing plaintiff, as thereafter mentioned, for the said costs and charges already incurred, as well as for the costs and charges which might thereafter be incurred, relative to the suits at law and in equity between Madden and the legal and equitable representatives and assigns of the late Edward Blevins, and of obtaining letters of administration to the said estate, in order to revive or continue such proceedings. The indenture then witnessed that, in consideration of the premises and of the sum of £25 already paid and advanced by plaintiff for Madden in respect of said business, and of the costs and charges thereafter to be incurred, the said Madden covenanted, granted and agreed to and with plaintiff, that he (Madden), his heirs and assigns, would stand seised and possessed of that part or tract of land containing fifty acres, more or less, composed of the south-west quarter of lot No. 14, in the first concession of Blenheim, to the use of plaintiff, his heirs and assigns, by way of lien on the said land, and by way of charge, security and mortgage on land, for said moneys so paid out and advanced,

and the costs and charges already incurred, and the costs and charges to be incurred in the suits (then) pending, or in the business which might be necessarily incident thereto, and when the law business was completed, that all such costs and charges should be rendered by said Miller to said Madden, his heirs, executors, administrators, or assigns, and the same should be duly taxed by the proper officer or officers of the Court as between attorney and solicitor and client, and plaintiff might, at his election, hold those presents, by way of charge, mortgage, and security upon the land, for the amount so to be ascertained, or Madden would, and he thereby covenanted for himself, his heirs, executors, administrators, and assigns, that he would, on demand, execute a good and sufficient mortgage in law, with bar of dower, if necessary, and with all usual covenants for payment, title, and freedom from incumbrances, to plaintiff, his heirs, executors, administrators, and assigns, of the said land and premises. This document was signed, sealed and delivered by Miller and Madden.

An indenture, dated the 16th of March, 1864, made between James Carroll, of the first part, and John McIntyre, of the second part, was also put in at the trial, reciting that the party of the first part had been Sheriff of the County of Oxford, and as such Sheriff, on the 1st of September, 1859, had received a writ of *fi. fa.*, issued out of the County Court of Oxford, against the lands and tenements of Madden, for £53 7s. 2d., damages and costs, at the suit of Charles Coote, and had also on the 8th March, 1860, received another writ of *fi. fa.*, issued out of the said Court, against the lands and tenements of Madden, for £75 17s. 7d., damages and costs, at the suit of John McIntyre; that under these executions the lands thereafter mentioned had been duly seized and exposed for sale, and being unsold the Sheriff returned, &c., and on the 11th of July, 1861, he received a writ, issued out of the Court of Common Pleas, whereby he was commanded to make of the lands and tenements of Madden £245 11s. 4d., damages and costs, in an action in the said Court at the suit of one

John Blevins, and the Sheriff received on the 31st August, 1861, two writs of *ven. ex.* and *fi. fa.* for residue in each of the two first named suits, whereby, &c.

By the indenture it was further recited, that the said lands were duly sold under such executions by said Sheriff to McIntyre, and a deed made to him accordingly.

On the 21st June, 1866, McIntyre conveyed the land in question to the defendant Stitt, in consideration of \$1250, and Stitt mortgaged the same back to McIntyre on the same day for \$750.

On the trial, at the close of the plaintiff's case, it was objected, (1) that the instrument under which plaintiff claimed passed no legal estate, it being only a covenant to stand seised, and that there was no consideration of blood or marriage to support it; and (2) that the deed was void on the ground of maintenance, plaintiff having taken the deed whilst the land was in litigation.

The learned Judge held that the conveyance might operate as a bargain and sale for the life of the grantee at least; that Madden being in possession of the land when the deed was made, the conveyance was good.

At the close of the defendants' case it was contended that Grey, having been the purchaser in fact at the Sheriff's sale, no conveyance could be properly made by the Sheriff to McIntyre, at any rate not without a proper transfer from Grey, and no such transfer had been shewn.

A verdict was entered for the defendants by consent, with leave to the plaintiff to move to enter it for him, if the Court should be of opinion he was entitled to succeed.

In Michaelmas Term last *Read*, Q. C., obtained a rule to enter a verdict for the plaintiff, pursuant to leave reserved, the title of defendant, McIntyre, having been acquired under a Sheriff's sale or deed made by the Sheriff which was contrary to law, and that there should have been a resale of the land after Grey, the original purchaser, declined to take the same.

This rule was enlarged until Easter Term last, when *S.*

Richards, Q. C., shewed cause:—The instrument under which plaintiff claims conveys no estate. It is not a covenant to stand seised to his use, and there is no consideration of marriage, or blood relationship. It cannot be treated as a bargain and sale: it does not define any estate to be given. It does not contemplate a present interest, for the latter part of the instrument shews another deed was to be executed to make the security a mortgage security. The bar of dower could have been obtained without a mortgage: *Tyrrells Case*, *Tudor's L. C.* 284; *Saunders on Uses*, 114.

The property was bound by the execution against land, and the sale under the execution gave the purchaser the property as against the plaintiff. The conveyance to McIntyre was perfectly good. He bid the same amount as Grey, and the letter of Grey, who throughout acted as the agent of the plaintiff, shews that he authorised the Sheriff to convey to McIntyre. The plaintiff ought not now to be permitted to take advantage of an irregularity, if any, which arose from his own act and that of his agent. The Sheriff, having seized and sold the land when in office, was the proper person to convey it: section 269 of the Common Law Procedure Act shews this. He cited *Doe Dissett v. McLeod*, 3 U. C. 397; *Anderson v. Radcliffe*, E. B. & E. 806; *Earle v. Hopwood*, 9 C. B. N. S. 566; *Kennedy v. Brown*, 13 C. B. N. S. 677; *Spry v. Porter*, 7 E. & B. 58; *Doe Tiffany v. Miller*, 6 and 10 U. C. pp. 425, 65.

Read, Q. C., contra:—The words are sufficient to shew that the grantor stands seised to the use of the plaintiff: *Crabbe*, R. P. II. 462, 3, 4, and the sec. in the Chapter on Uses; *Edward Fox's Case*, 8 Coke, 94a; *Watkyns' Con.*, 8 Ed. 530, *Notes*; 2 *Institutes*, 672; *Grey v. Edwards*, 4 Leon. 110; 3 Leon. 16; *Taylor v. Vale*, Cro. Eliz. 166.

Grey was Miller's agent in making the purchase. McIntyre's name was not down in the Sheriff's books as the purchaser or buyer. Grey did not assign his interest to any one. The Sheriff should have sold the property again when Grey refused to carry out the sale.

The present Sheriff was in office when the deed was made

and should have executed the conveyance: *Doe v. Garrow*, 5 U. C. 237; *Cameron v. Robinson*, 7 U. C. 335.

RICHARDS, C. J., delivered the judgment of the Court.

In the argument it seemed conceded that the instrument taken by the plaintiff was not void for champerty: the authorities seem to sustain that view. *Anderson v. Radcliffe*, 1 E. B. & E. 806, would support the instrument under which the plaintiff claimed against that objection.

The document can only operate under the Statute of Uses, as being granted on a money consideration, and it expressly recites that in consideration of the premises, that is, the prior indebtedness for professional services, and to secure plaintiff for future professional services, *and of the sum of £25 already paid and advanced by plaintiff to him, and of the costs and charges already made and to be made, he, Madden, covenanted, granted and agreed that he would stand seised and possessed of the land to the use of plaintiff, his heirs and assigns, by way of charge, security, and mortgage on the land*, for the said moneys and costs, and, when the costs were taxed as between attorney and client, plaintiff, it was declared, might hold the instrument as and by way of a *charge, mortgage, and security upon the land for the amount to be so ascertained*, or Madden would; and he thereby covenanted for himself, his heirs, executors, and assigns, that he or they would, on demand, execute a good and sufficient mortgage in law, with bar of dower, if necessary, and with usual covenants for payment, title, and freedom from incumbrances, to plaintiff, his heirs and assigns, of the said lands.

It may be that full effect would be given to the whole instrument, and the real intent of the parties to it carried out, by holding that it was to operate as a charge, security and mortgage in equity on the land until the amount of plaintiff's claim was ascertained and taxed, and so continue as an equitable charge, unless plaintiff desired a *legal mortgage*, and then Madden covenanted to execute such mortgage, with a bar of dower, if necessary. I do not think the

words "if necessary" apply to the executing of a legal mortgage, so as to make the covenant one which would not be broken by Madden, if he refused to execute a legal mortgage, on the ground that that was unnecessary, as the instrument he had executed was a legal mortgage. On the contrary, I think the object was to compel him to execute a legal mortgage, if plaintiff required it; and such appear to me to be its express terms; and this mortgage was to have a bar of dower if necessary.

What would be the effect of holding that the legal estate in the land passed by virtue of the consideration named and the covenant to Miller? Would he be bound in equity to pay off the prior incumbrances? and would he also be bound by any and all the covenants, if any, running with the land? and could he immediately on its execution have ejected Madden from the possession of the premises? If these effects would follow the holding that the legal estate passed to plaintiff, such, I apprehend, was not the intention of the parties, and before making a decision which would be so manifestly contrary to the intention of the parties, we ought to be satisfied beyond all doubt that the law and facts of the case compel us so to decide.

On the whole, if compelled to decide whether plaintiff under the instrument took the legal estate, so as to enable him to maintain this action, I should require time for further consideration and examination of the law applicable to the subject. But it seems to me the plaintiff must fail on the other grounds raised at *Nisi Prius*, and suggested on the argument in opposition to the plaintiff's rule.

It is not disputed that the executions against lands, followed by the writs of *venditioni exponas* and *fi. fa.* for residue, in the cases of *McIntyre v. Madden* and *Coote v. Madden*, had priority over the plaintiff's lien or mortgage. Under these writs the lands were seized and sold, and no objection arises or is taken up to this point. All seems to have been correct and regular down to the time of the sale by the Sheriff on the 1st of October, 1862, when the lands in dispute were knocked down to Miller's agent (Grey), as the purchaser, for £225.

After this the first difficulty arises in consequence of the plaintiff, on the 11th of October, 1862, giving Grey, his own agent, as well as the Sheriff, notice that an injunction had been ordered by the Court of Chancery restraining the sale of Madden's lands under these executions, and notifying each of them, in the meantime, as the attorney for Madden, not to complete or further carry out the sale.

This notice was followed by one from Grey to the Sheriff, dated the 13th of December, 1862, informing him that he was at liberty to convey the lands entered in his name at the Sheriff's sale to any person or persons he thought fit, as he relinquished all claim and interest in the land so sold.

Mr. Miller, through himself and his agent, and by bringing to the Sheriff's knowledge the order for the injunction, seems to have prevented the completion of the Sheriff's sale up to the 13th of December, 1862. Whether the Sheriff after that could have completed the sale under the execution, having knowledge of the order for the injunction, by a resale or conveyance of the property to another bidder, was not discussed on the argument. At all events that course was effectually prevented after the 6th of January, 1863, by the injunction itself having been served on the Sheriff by the plaintiff Miller. From that time until the 1st of September, 1863, when the bill in Chancery filed by Madden was dismissed with costs, so far as related to *McIntyre* and *Coote*, it would not have been prudent for the Sheriff to have taken any further steps to have completed the sale made under the executions.

It does not very clearly appear from the evidence when Sheriff Carroll went out of office. If prior to the 1st of September, 1863, what could have been done at that time to carry out the sale? He had seized the land under the executions; had returned that he had it on hand unsold for want of buyers; had been commanded by writs of *venditioni exponas* to sell it, and this plaintiff had substantially become the purchaser through his agent. He then, by giving notice of the order for the injunction to the Sheriff and his own agent, prevents that sale being carried out, and at

the same time shews that any other sale would be contrary to the injunction that had been ordered. In this state of things plaintiff's agent notifies the Sheriff that he is at liberty to convey the lands sold at the Sheriff's sale and entered in his name to any person or persons, and he relinquishes all claim to the lands so sold. On this, after the Sheriff was at liberty to act, by the dismissal of the bill in Chancery, out of which the injunction arose, he (the Sheriff) conveyed the lands to another bidder at the same sale for the same price. It is not shewn that Madden or the present plaintiff (Miller) desired that the land should be again sold, nor does it appear on what terms the sale by the Sheriff took place. If, by the terms of the sale, upon the person, to whom it was knocked down, refusing to carry out the purchase, the same was to be adjudged to the next bidder, then, I presume, that the conveying the land to McIntyre, who was a bidder at the sale for the same amount as Grey, would be correct. In the absence of any evidence to the contrary, I think, we must assume that the Sheriff has proceeded regularly in conveying the land to McIntyre.

But, taking all the facts together, this plaintiff surely cannot be permitted to object to the conveyance to McIntyre. It was the means by which his client, Coote, in the action against Madden, obtained satisfaction of his debt. It was made under the express authority of his agent Grey, and in that view under his own authority, for the Sheriff by Grey's letter of the 13th December, 1862, was declared to be at liberty "to convey the lands to any person he might think fit, as he (Grey) thereby relinquished all claim in the lands so sold." After that the Sheriff might well feel at liberty to convey to McIntyre, who had been a bidder at the same sale for the same amount as Grey.

Upon what principle, then, is the plaintiff, Miller, to be allowed to interfere to defeat this sale? Not because he objected to it at the time, for the authority of Grey, his agent, is express that the Sheriff may convey. Then, as representing Madden? The full price at which it was bid off was paid for the land, and it is not suggested there was

any fraud or impropriety of conduct in the management of the sale. If Grey had for a nominal consideration assigned his interest in the land so bought to McIntyre, and requested the Sheriff to convey to him, it cannot be doubted that the Sheriff might properly have conveyed the land to McIntyre; and does not the memorandum signed by Grey as fully authorise that transfer, whilst it remained unrevoked, as the more formal instrument would have done? I think so.

On the whole, failing to see how any one has been prejudiced by the transfer by the Sheriff, and in the absence of any authority or good grounds for setting aside the conveyance by the Sheriff, I think we are bound to uphold it.

Under the 269th section of the Common Law Procedure Act (Con. Stat. U. C., cap. 22), it is expressly provided that any Sheriff after he has gone out of office may execute any deed or conveyance necessary to effectuate and complete a sale of land made by him whilst in office.

Sheriff Carroll did make a sale of the lands in question in this cause whilst in office, and the deed he has made since he went out of office, under which defendants claim, was executed to effectuate and complete the sale of lands so made, and we think it is valid.

The rule will therefore be discharged with costs.

Rule discharged, with costs.

SWEENEY V. THE PRESIDENT, DIRECTORS AND COMPANY
OF THE PORT BURWELL HARBOUR.

Harbour Company—Pier lights—Actual notice—Damages—Pleading.

In an action against a Harbour Company, charging that it was their duty to keep a sufficient light upon the end of one of their piers, as they had been in the habit of doing, to enable vessels to enter with safety, and that they had wrongfully removed such light without giving sufficient public notice, by reason of which the plaintiff's vessel, while endeavouring to enter the said harbour, had been lost, *Held*,

1. That the arbitrator, to whom the matters of fact had been referred, having found that it was necessary that such a light should be maintained for the proper use of the harbour by vessels entering in the night time, and that the immediate cause of the loss was the absence of the light, the defendants were *prima facie* guilty of a negligence, for the consequences of which they were liable.
2. That even if the defendants would under certain circumstances be justified in closing their harbour to vessels and removing the light, they were bound to give reasonably sufficient notice of the same, and that the notice given was not of that character.
3. That in addition to the value of his vessel, the plaintiff was entitled to recover a further sum expended by him in good faith, and with a reasonable expectation of success, in attempting to raise the vessel, for the purpose of repairing her.
4. That an Insurance Company which had a risk upon the vessel, was not entitled to recover, in the name of the plaintiff, moneys expended by them in a similar attempt.

Semble, that a plea of *not guilty* put in issue the negligence only, and not the duty alleged.

Remarks upon the extent to which the possession of means of knowledge furnishes evidence of actual knowledge.

SPECIAL CASE.

The declaration alleged that the defendants, under the authority of an Act of Parliament, had constructed piers and wharves, and formed a harbour at Port Burwell, and placed and maintained a light on the end of one of the piers until the time thereafter mentioned, and had levied tolls on all vessels entering the harbour; that it was the duty of the defendants to keep the said light, as they had been in the habit of doing, in order, that vessels seeking to enter the said harbour by night might do so with safety, which, without such light, they could not do; that previously to the 8th November, 1866, the defendants so kept and maintained such light, and that the plaintiff, in a voyage down Lake Erie, saw such light on the said night; that the defendants thereafter wrongfully and negligently ceased to keep and

maintain such light, and wrongfully removed the same without giving any proper and sufficient public notice thereof, and without allowing a sufficient time to elapse before so doing, in order that the public, and amongst them the plaintiff, could obtain knowledge and notice thereof, by reason whereof the plaintiff's vessel, on her return-voyage up Lake Erie on the night of 10th November, before it was light, being compelled by stress of weather to seek a harbour of refuge, endeavoured to enter the said harbour, the plaintiff and his crew being ignorant of the removal of the said light, and when it was discovered that the said light had been so removed, it was impossible for the plaintiff or his said vessel to escape either running on the said piers or ashore, except by endeavouring to enter said harbour without the aid of such light, which, had the light not been removed, they could have done with ease and safety, but in consequence of such removal they were driven on one of the said piers and greatly damaged, and ran ashore and the vessel became a total wreck, and the plaintiff thereby not only lost his said vessel, but incurred great labour and expense in endeavouring to save her, which it was found impossible to do.

Pleas—1. Not guilty.

2. Denial of the plaintiff's property in the vessel.

3. That before the said time when, &c., the said harbour became and was obstructed by large accumulations of mud and sand, which the defendants were unable immediately to dredge out and remove, and the defendants thereupon determined to close and did close the said harbour, and ceased to take or levy tolls or dues upon vessels entering or coming into the said harbour; and the defendants gave further notice by an advertisement in the leading newspapers of Toronto, St. Thomas, Buffalo, and other places; and the plaintiff and master of the said vessel had at and before the said time when, &c., actual notice and knowledge that the said harbour was closed as aforesaid.

Issue.

The case was brought down for trial at the last Spring Assizes for the County of York, when a verdict was

taken for the plaintiff, subject to the finding of an arbitrator, who was to examine the witnesses and report upon the facts and the amount of damages, when the Court was to direct whether a verdict should be entered for plaintiff or defendants, or a nonsuit, &c., &c.

The arbitrator afterwards made his award, by which he found as follows :

That the defendants were a Company incorporated by the Stat. of Canada 12th Victoria, cap. 160.

That the harbour was not a natural harbour, but had been formed by piers built by the company out from the shore southerly into Lake Erie, with a space of 95 feet between them, which space had been deepened by dredging for the whole length of the piers, and was usually at high water 10 feet deep.

That the effect of storms was to fill up this space partially, the sand there forming the bottom of the lake being by the waves driven in between the piers, thus shoaling the water in the harbour, and that in consequence it was necessary from time to time for the company to dredge the bottom to preserve the necessary depth of water.

That there was during the season of navigation a light exhibited at Port Burwell in the night time, (not at the harbour but inland,) which was called the Government light, being furnished by the Government, and not being under the control of the defendants : that this light was a white light, and could be seen several miles out in the lake : that it served to mark from a distance the place of the harbour, but did not enable, and was not intended to enable, a vessel to enter the mouth of the harbour in the night time.

That there was during the season of navigation a red light exhibited in the night time by the defendants, at the southerly end of the westerly pier of their harbour, which red light could be seen for a distance of a mile and more on a clear night, when the light was burning clearly : that this light marked the entrance to the harbour, and enabled vessels in the night time to run between the piers, and was necessary to enable a vessel to enter with safety in the night time.

That on the fifth day of November, 1866, the water between the piers was 8 feet 6 inches deep, and that the water on the bar opposite the mouth of the harbour was then of the same depth, and on that day the directors of the defendants' company resolved to close their harbour on and from that day until further notice, to discontinue the receipt of tolls in the harbour, and to remove the light from the western pier.

That some of the larger vessels which traded to Port Burwell draw, when fully laden, from eight to over nine feet of water. That just before, and for some time before the said fifth of November, the weather had been stormy, and the defendants could not in consequence dredge their harbour: that the directors of the company, in so resolving to close their harbour and remove the light, acted in good faith, from a fear of danger to vessels endeavouring to enter, from the shoalness of the water in the harbour, and from a fear of the responsibility which would attach to the company from any accident which might occur to vessels from that cause: that it was dangerous for such large vessels as aforesaid to attempt in stormy weather to enter the harbour when laden, with the depth of water which existed on the 5th of November as aforesaid.

That on the said fifth day of November the directors caused a printed notice to be posted up at Port Burwell, notifying the public that the harbour there was closed, the tolls taken off, and the lights removed, and that this notice, which was by mistake dated the 5th "October," was sent by the secretary of the company to the collectors of customs at the following places, Port Rowan, Port Dover, Port Bruce, Fort Erie, Hamilton, Toronto, St. Catharines, Port Colborne, Dunnville, Kingston, Windsor, Port Stanley, and Cobourg, all ports in Upper Canada, and to the collectors of customs at Erie, Buffalo, Cleveland, and Detroit, ports in the United States, and also to a ship broker in Buffalo; and the said notice was at the said time also sent for publication to the *St. Thomas Journal*, and to the *Toronto Globe* and *Leader*. That upon the mistake in the date being discovered, new printed notices, dated the 5th November, were

mailed on the 6th November to the above-named persons and places, and also on the latter day to the collectors of customs of Port Ryerse, in Upper Canada, and to the collectors of customs at Asthabula and Oswego, ports in the United States. The said notice was published in the *Globe* and *Leader* aforesaid, on the 8th of November, 1866, and and in the Cleveland *Leader* on the 9th November: that it was posted in the custom house in Buffalo the 9th November, and was published in a public newspaper in Buffalo on the same day.

That the said red light was exhibited by the servants of the defendants in the usual place, on the western pier, on the night commencing on the evening of the 5th and ending on the morning of the 6th November, and also on the night next following, commencing on the evening of the 6th and ending on the morning of the 7th: it was not exhibited on the evening of the 7th, nor afterwards, but was then and thenceforth discontinued by order of the defendants.

That the vessel in the declaration mentioned, being about 150 tons burden, was the plaintiff's vessel, and left the harbour of Port Stanley, being a port on Lake Erie lying westward of Port Burwell, on the night of the 6th and 7th November, on her trip from Port Stanley to Buffalo, and that on that trip she sailed past Port Burwell early on the morning of the 7th day of November before daylight, and the captain (being the plaintiff) and the crew of the said vessel on that occasion saw the lights at Port Burwell, that is, the Government light and the red light of the defendants: that the said vessel proceeded on her way to Buffalo, arriving there on the night of the 7th November, was there unloaded, and remained in that port until the afternoon of the 10th November, the captain and crew being during all the intervening period in Buffalo: that on the afternoon of the 10th the vessel left Buffalo, bound for Port Stanley light, drawing four feet six inches of water, having a wind from the north-east: that she proceeded on her voyage during the night of the 10th, the wind increasing during the night

and shifting, first to the east, then round by the south to south-south-west: that as long as the vessel could hold her course she made for Port Stanley, and when headed off by the shifting of the wind to the southward and westward, she was steered for Port Bruce, a port lying easterly from Port Stanley, between the latter and Port Burwell, when the wind continuing to increase in violence, it was found impossible to make Port Bruce, and it became necessary to get the vessel on the other tack to prevent her being driven on shore: that shortly after, about the hour of four o'clock on the morning of the eleventh of November, it being then dark, the wind, which had been blowing from south-south-west, veered again to the south and rendered it impossible for the vessel to clear the land, and the captain therefore then bore away for Port Burwell: that at the time the vessel bore away for Port Burwell, she was between two and three miles distant from it to the southward and westward, the night not being clear, but then and until the vessel struck, cloudy and rainy: that the Government light at Port Burwell was visible to the crew, but not the red light; and that up to that time neither the captain, nor any officer, nor any of the crew of the vessel, had any actual notice or knowledge of the fact that the harbour had been closed, or that the light had been removed: that when the vessel approached near to the pier, the night being obscure, and it was first ascertained that no light was there, it was then too late to change the course of the vessel, and that in the endeavour to make the entrance of the harbour the vessel struck the western pier and was cast on the beach west of the harbour, and hence was lost: that the captain in his then position, not knowing of the removal of the light, took the most prudent course, and acted with skill and judgment in endeavouring to make the port: that the immediate cause of the vessel striking against the pier was the absence of the defendants' light, and that had it been exhibited the vessel could have made the harbour.

The arbitrator also made a special finding as to the damages, which it is unnecessary to give in detail.

J. H. Cameron, Q.C., and *W. H. Burns*, for the plaintiff, cited 14 & 15 Vic. ch. 157; 18 Vic. ch. 199; 23 Vic. ch. 103; 2 Wm. IV. ch. 15; 12 Vic. ch. 160; *Jenkins v. Port Burwell Harbour Co.*, Trin. Term, 2 & 3 Vic.; *Webb v. Port Bruce H. Co.*, 19 U. C. 614, 623; *Dixon v. Bell*, 5 M. & S. 198; *Spark v. Heslop*, 28 L. J. Q. B. 197; *Hughes v. Quentin*, 8 C. & P. 703; *Randell v. Trimmen*, 18 C. B. 786; *Richardson v. Dunn*, 8 C. B. N. S. 655; *Collen v. Wright*, 8 E. & B. 647; *McDonald v. Port Dover Co.*, 3 C. P. 402; *Clark v. Blything*, 2 B. & C. 254.

M. C. Cameron, Q.C., and *Moss*, for the defendants, cited *Raphael v. Bank of England*, 17 C. B. 161; *Gibbs v. Trustees Liverpool Docks*, 3 H. & N. 164; *Mersey Docks v. Penhallow*, 7 H. & N. 329; *Berryman v. P. B. H. Co.*, 24 U. C. R. 34; *Walker v. Goe*, 3 H. & N. 395; *Thompson v. N. E. R. Co.*, 2 B. & S. 106; *Birkett v. Whitehaven Junction*, 4 H. & M. 730; *The Egyptian*, 10 L. T. N. S. 910; *The Eolides*, 3 Hagg. 367; *The Columbus*, 3 W. Rob. 158; *The Clarence*, 3 W. Rob. 283; *The Pactolus*, 1 Swab. A. R. 173; *The Clyde*, 1 Swab. A. R. 23.

RICHARDS, C. J., delivered the judgment of the Court.

The cases of *Webb v. The Port Bruce Harbour Company* (19 U. C. 623); *Berryman* against these defendants (24 U. C. 34,) seem to establish the general liability on the part of these defendants to compensate the owners of vessels lost in consequence of the negligence of the defendants and their servants in keeping the harbour in proper order for the entry and safety of vessels seeking refuge therein.

The first question to be considered is, whether, under ordinary circumstances, and the harbour open for traffic, they would be liable for loss of a vessel arising from not keeping up the red light which was at the end of their harbour, the omission to keep up which in the way they had usually kept it up and which it was necessary should be kept up for the proper use of the harbour by vessels entering it in the night

time, was the cause of such loss. I cannot doubt they would be liable. The arbitrator finds as a fact that such a light has always been kept up during the season of navigation, and is necessary to enable a vessel to enter the harbour with safety in the night time. The omission to keep up this light, as necessary to the entry into the harbour of vessels in the night time, as well as not having the proper depths of water, would constitute a neglect of duty quite as likely to produce danger and disaster to those intending to use the harbour, as any that could be suggested. The second section of defendants' act of incorporation authorizes them to construct a harbour which shall be accessible and fit, safe and commodious for the reception of such description of vessels as commonly navigate Lake Erie, and to erect and build all such needful moles, piers, wharves, buildings, and erections whatever, as shall be useful and proper for the protection of the harbour, and for the accommodation and convenience of vessels *entering*, lying, and unloading within the same.

The fourth section allows them to charge certain tolls as soon as the harbour shall be so far completed as to be capable of *receiving* and sheltering vessels. If there were no light at this harbour to enable vessels to run in there during the night, it could hardly be said to be capable of *receiving* and *sheltering* vessels.

The observations made by the Judges in *The Lancaster Canal Co. v. Parnaby* (11 A. & E. 233) would apply here. The action there was against the company for an injury arising from a barge sunk in the canal, which they had not removed. The defendants contended, as they had not put it there, they were not liable for any accidents arising from its being there; that their charter did not oblige them to remove it, though it permitted them to do so. Chief Justice Tindal said: "The company opened the canal to the public upon the payment of tolls to the company, and the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to

navigate it, that they may navigate it without danger to their lives or property."

The best evidence of the necessity of the light to the proper use of the harbour is the fact that it is always kept up when the harbour is open.

The duty of the defendants to keep the light burning during the night, as they have been accustomed to do, is averred very emphatically in the declaration.

The only plea which can be said to deny the duty alleged is the general issue, and that, I take it, only denies the negligence.

Primâ facie, then, it seems to me to be established by the pleadings and the facts found that the loss of the plaintiff's vessel arose from the negligence of the defendants in not keeping up the light on the end of their pier, as they had been accustomed to do.

The answer to that comes up under the third plea, "that before the time when, &c., their harbour became obstructed by a large accumulation of sand, which they were not able immediately to dredge out and remove, and they thereupon determined to close, and did close, the harbour, and ceased to take or levy tolls or dues on vessels entering or coming into the harbour, and they gave further notice by an advertisement in the leading newspapers of Toronto, St. Thomas, and Buffalo, and other places; and the plaintiff and master of the said vessel had at and before the said time when, &c., actual notice and knowledge that the said harbour was closed as aforesaid."

It is stated, in argument, that this course was taken in consequence of a suggestion by the Court in giving judgment in *Berryman* against these defendants. In referring to the sudden formation of bars and shoals near artificial works, which might cause obstructions to the harbour, the learned Chief Justice remarked: "Time must necessarily be allowed for the removal of an obstruction so created. If it renders the entrance to the harbour dangerous, every possible notification of the danger should be given, and every available precaution taken for the safety of vessels using it, and even

then it is not difficult to suggest cases where the harbour company would be liable; so that the most prudent course would be to close the harbour until repaired or restored to a proper condition." When making these observations, the learned Chief Justice no doubt had before him the judgment delivered in the Exchequer Chamber by Mr. Justice Coleridge, in *Gibbs v. The Liverpool Docks*, reported in 3 H. & N. 177, from which I make the following extract:

"We think if they had a discretion, under the circumstances, to let the danger continue, they ought, as soon as they knew of it, to have closed the dock to the public, and they had no right, with a knowledge of its dangerous condition, to keep it open, and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls to them, might enter and navigate the dock. The case of *The Lancaster Canal Company v. Parnaby* establishes that the defendants would have been responsible, under the circumstances, if they had had a beneficial interest in the tolls that were received." The Judge then concludes: "The duty, in our opinion, is equally cast on those who have the receipt of the tolls and the possession and management of the dock vested in them, to forbear from keeping it open for the public use of every one who chooses to navigate it on payment of the tolls, when they know it cannot be navigated without danger, whether the tolls are used for a beneficial or for a fiduciary purpose, and for the consequences of this breach of duty we think they are responsible in an action."

From the very nature of the works themselves, the Liverpool Docks and the Lancaster Canal could be closed to the public whenever it was dangerous to navigate them, and there would be no necessity of giving notice to the public that they were not open for the mere purpose of preventing vessels from entering them, though in the event of their being so closed it might be well to notify the public, to prevent claims of another character arising than injury to vessels whilst using them. But here the harbour is, from

its very construction, entirely open to be entered by vessels navigating the lake, and the only mode that their masters can reasonably be expected to know of the state of the harbour, and the intention of its owners with respect to its use, to be of any practical service, is by receiving notice.

Actual notice, if given, would of course be the best evidence that the masters of vessels had knowledge of the intention of the proprietors of the harbour to close it and remove the lights, and not charge tolls for its use. If actual knowledge is not brought home to the party claiming damage arising from want of such knowledge, then the defendants should set up such notice of the fact, or circumstances from user and other circumstances, from which it might be inferred that the party complaining of such want of knowledge really had it.

I take it the plea does not set up that the mere notice shewn to have been given in this case relieved the defendants from all responsibility with reference to losses which might occur in the harbour. What is alleged as a substantive fact in the plea is that "the plaintiff and master of the vessel had at and before the said time when, &c., actual notice that the said harbour was closed;" and in argument it was contended that if the master had an opportunity of knowing the fact (and he had such opportunity from the notice having been put up in the custom house at Buffalo before he sailed from that port), then if he did not avail himself of such opportunity, it is the same as if he had had actual notice.

On this point the language of Chief Justice Tindal, in *Bell v. Gardiner*, (4 M. & G. p. 24,) is very pertinent, and I think will be generally assented to, as laying down the proper rule in such cases—(He is not, of course, using this language in relation to persons who have a peculiar duty cast upon them, which makes the knowledge of certain facts a part of their duty)—"We can in fact regard the possession of the means of knowledge only as affording a strong observation to a jury, to induce them to believe that the party had actual knowledge of the circumstances; but there is no

conclusive rule of law that because a party has the means of knowledge, he has the knowledge itself. There may be cases where the existence of the means of knowledge might lead inevitably to the inference that the party had actual knowledge." And in the same case Mr. Justice Cresswell said: "When the party has the means of knowledge, it may be evidence of actual knowledge; but no case has been decided that means of knowledge are equivalent, as a matter of law, to actual knowledge." Other and more recent cases seem to sustain the same view. See cases referred to in 7 H. & N., at p. 337.

It is not now necessary to determine if giving notice on the 5th or 6th of November of the closing of the harbour, would release defendants from all kind of responsibility to ship-owners, arising from accidents, even though they may have had actual notice of defendants' intention so to do. If notice is to be used for releasing defendants from responsibility, it must be reasonable notice in relation to the circumstances under which it is given. If, as a general rule, at certain seasons of the year the defendants' harbour cannot be safely approached, and they cannot by any reasonable exercise of care and skill make it safe in that respect, and timely notice of that fact is given to all vessels frequenting the harbour and navigating that coast, the defendants might then possibly be relieved from liability; but giving a notice on the 5th of November that their harbour is to be thenceforth closed, which notice is not published or made known in many of the ports where vessels frequenting and passing that harbour may be then lying, until five or six days thereafter, and then perhaps only on the very day that the vessel suffering damage left port, would hardly be considered reasonable notice to such vessel, if not brought home to the knowledge of the master.

I take it for granted, on the finding of the arbitrator, that the loss occurred from the removal of the defendants' light from the harbour without notice to the master and owner of the plaintiff's vessel, and not from any negligence or want of care or skill on the part of the finding and management

of the vessel: that not having this knowledge of the fact of the removal of the light, the master and crew of plaintiff's vessel were not guilty of any want of reasonable care and skill in the management of the vessel in making for that harbour, which she might have entered but for the removal of the light.

Under the finding and facts, I think the plaintiff entitled to recover.

Then as to the question of damages. If the vessel had been wholly lost, there is no doubt that, if entitled to recover, plaintiff should have the full value of the vessel, which is found to be five thousand dollars.

I do not see on what principle the Insurance Company is entitled to recover in the name of the plaintiff for the money they chose to expend in endeavouring to raise and repair the vessel. No authority was referred to to sustain that view, and we have not met with any.

The arbitrator found that the plaintiff expended \$672 in endeavouring to raise the vessel for the purpose of repairing her, and that the endeavours so made were made in good faith, and with a reasonable expectation of being able to raise her.

In *Tindall et al. v. Bell* (11 M. & W. 228), which was an action for running down a ship, as to the liability of the defendant to pay certain charges named by the plaintiffs, to an observation of the defendants' counsel, that it was not a contract to indemnify, it was a case of tort, and the defendants were liable only for the necessary or natural consequences of the collision, Baron Parke answered, "The parties are in the same situation as if the defendant had entered into a contract not to do the act complained of: this is not a contract to indemnify." He also remarked: "The necessary consequences of the wrong are what a prudent man would reasonably do to repair the mischief. It is perhaps like the case in insurance law, where the question is whether a prudent man would repair or sell the ship. When the mischief is done, the necessary consequences of it are what a reasonable man would do under similar circumstances when he had no other judgment but his own to resort to."

In *Richardson v. Dunn* (8 C. B. N. S. 655,) Byles, J., referred to the note to *Vicars v. Wilcocks*, (2 Smith's Leading Cases, 430,) where reference is made to actions of tort unattended with circumstances of aggression, and where the principal as to damages is stated to be, a strict adherence to the rule that they must be the natural and proximate consequences of the act, and that must be adhered to.

Here the plaintiff acted in good faith, and with reasonable expectation of saving the vessel expended \$672. The wreck was sold for \$700. This is the only evidence we have of its value, and which, I take it, we must assume to have been the value when the accident occurred. This would be about \$28 in excess of what plaintiff expended in endeavouring to save the wreck. This, when deducted from the \$5,000, leaves \$4,972, which I think are the damages which are the natural and proximate causes of the wrong complained of.

I do not think in this matter we are obliged to take notice of any bargains or transactions between the plaintiff and the Insurance Company, of which these defendants had not any notice, or to which they were not called upon to give their assent.

Judgment for plaintiff.

MEMORANDA.

The following gentlemen were called to the Bar during this Term :—JAMES FISHER, S. C. B. DEAN, C. GIVINS, P. MCCARTHY, T. W. THOMPSON, G. W. OSTRUM, D. H. PRESTON, THOMAS DIXON, W. R. BAIN, H. THORNE, F. E. KILVERT, F. HOLMSTED, J. N. BLAKE, R. H. R. MUNRO.

MICHAELMAS TERM, 31 VICTORIA, 1867.

HON. WILLIAM BUEL RICHARDS, C. J.

“ ADAM WILSON, J.

“ JOHN WILSON, J.

MURRAY V. DAWSON.

Fence-viewer's Act (C. S. U. C. ch. 57)—Non-compliance with award—Restriction to statutory remedy—Pleading.

The declaration was against the defendant as owner of a lot adjoining the plaintiff's land, alleging the existence of a large quantity of surplus water upon both lots; that both parties disputed as to their respective rights and liabilities under the Fence-viewer's Act (C. S. U. C. ch. 57), and steps were thereupon taken to procure an award under said Act, which was accordingly done, and an award made in the presence and with the assent of both parties. The declaration then went on to recite the award verbatim, which directed two ditches to be made by the parties, one by each, and concluded thus, “said ditch to be made before the 1st October, 1865.” Plaintiff then averred performance of the award on his part, but a neglect and refusal to perform it on the defendant's part, and claimed damages for such neglect and refusal: *Held*, on demurrer, that the declaration was not bad as failing to disclose a case which gave the fence-viewers jurisdiction, which it sufficiently did, but that it was bad as setting out an award which did not fix the time each party should have within which to perform his share of the ditching, or direct where such ditching should be made; and also for not shewing that a demand in writing had been made on the defendant to perform the award, the non-compliance with which would have entitled the plaintiff under the Act to have completed the ditch and sued for the price fixed, instead of bringing an action for damages, which could not be maintained.

The eleven sub-sections of section 16 of the above Act refer to ditches and water-courses as well as to fences.

THE declaration is sufficiently stated in the head note.

The defendant pleaded a plea, which was demurred to, and to which it is unnecessary further to refer, as the judgment of the Court turned on the following, among other,

exceptions to the declaration, which were given notice of by the defendant :

1. That the declaration does not set out such a case of action as gives jurisdiction to fence-viewers under the Statute.

2. It does not appear that the fence-viewers were satisfied that the defendant was duly notified of the meeting.

3. The length of time the plaintiff and the defendant had respectively to open the ditches does not appear to be stated in the award, which is consequently bad.

5. That no demand in writing appears to have been made on the defendant to perform the award, and had such been made the plaintiff might and ought to have finished the ditch and sued for the price.

7. That the place to dig or open the water-course is not definitely stated in the award.

McMichael, for the plaintiff, referred to and commented upon the Fence-viewer's Act, secs. 13, 14, and *Russell* on Awards, 505.

D. B. Read, Q. C., contra, referred to secs. 3, 14, 16, of the above Act, and *B. & L.*'s Prec. 424, 425.

J. WILSON, J., delivered the judgment of the Court.

The declaration is objected to on several grounds. As to the first, we think it does set out a case which gave the fence viewers jurisdiction. It sets out all the circumstances mentioned in the seven sections of the 22nd Vic., ch. 57, and that a dispute had arisen in regard to the rights and liabilities of these parties, as mentioned in the fifth section.

We think there is nothing in the second objection : the proceedings of the fence-viewers are alleged to have been conducted, and the award made in the presence of both parties, and with their assent.

We think the third objection is good. The twelfth section requires that the fence-viewers shall decide what length of time each of the parties shall have to make his share of the ditch. The award says, "Said ditch is to be made before the

first day of October, 1865." On reading it two ditches are spoken of; one to be made by the plaintiff, another by the defendant, beginning at the same fence. The last ditch spoken of in the award is the defendant's. If the time applies to hers, there is no time for the plaintiff to make his; if it applies to the plaintiff's ditch, there is no time specified for the defendant to make hers. It does not appear by the award that it is to be one continuous ditch, but rather two ditches, and is bad for not appointing the time for both parties to make it, and where it is to be made.

The fifth objection we think well founded, and it puts an end to the action. In *Berkeley v. Elderkin* (1 El. & B. 805), the principle is recognised, "that where new rights are given, with specific remedies, the remedy is confined to those specially given." Much that was said by Lord Campbell applies by analogy with great force here. In clearing our forests, much inconvenience was felt in many places from the land being wet, and as the tracts granted to settlers were small, it was frequently impossible to drain one lot without trespassing upon another, or for one man to drain his land without the assistance of others equally interested in draining theirs, while without such drainage the land could never have been cleared and cultivated. In view of this the Legislature, in providing for the rights and liabilities of adjacent proprietors with regard to fences, provided for a simple and cheap system of opening ditches or water-courses, by the 8th Vic. cap. 20, secs. 12, 13, 14. This Act imposed the duty on those who were interested in drains to contribute a just share: it gave the right to make ditches across the lands of those who were not interested, and where disputes arose, it enabled the parties to apply to the fence-viewers to award concerning their disputes. It provided that if any party neglected or refused, upon demand made in writing, to open, or make and keep open, his share awarded to him by the fence-viewers, within the time allowed, either party, after completing his own part, might open the part of the party neglecting or refusing, and be entitled to recover not more than two shillings per rod from

the party neglecting or refusing to open his share, in the same manner as the act provides for payment of line and division fences.

But our attention has been called to the fact, that, in the consolidation of this Act by the 22 Vic. cap. 57, while section 16 enacts that to ascertain the amount payable by any person, who, under the authority of this Act, makes or repairs a fence, or makes, opens, or keeps open any *ditch* or *water-course*, which another person should have done, and to enforce the payment of such amount, the following proceedings shall be taken, the eleven sub-sections refer to fences only, and ditch or water-course is omitted, upon which it is contended that there is no remedy to recover the amount payable in respect to a ditch or water-course.

We do not think so. When we see that this section, as well as those which precede it, respecting ditches or water-courses, gives the right to recover from the defaulting party the amount of work the other performs, upon his default, not exceeding in price per rod fixed by the Statute, we think we should not be justified in holding that, because in prescribing the proceeding for its recovery, the Legislature had omitted to repeat the word ditches or water-courses, it intended to withhold that which it had so clearly given. Looking at the provision of the original Statute and of this, we are of opinion that the proceedings mentioned in the eleven sub-sections of section 16, have reference to ditches or water-courses, as well as to fences. In *Doe Murray v. Bridges* (1 Bar. & Ad. 858), it is said by Tenterden, C. J.: "We are to look at the Act to learn by what mode the intention is to be carried into effect."

In this view of it, it follows that this plaintiff had his remedy under this Statute and no other; that he ought to have demanded of this defendant performance of this award, and if she made default, that he ought to have opened her ditch, and compelled her to pay for it under the provisions of this Act: *The Vestry of St. Pancras v. Batterbury* (2 C. B. N. S. 477). *Cockburn*, C. J., at page 486, says: "Where an Act of Parliament creates a duty or obligation, and gives

a remedy for a breach of it by a peculiar proceeding, a question arises whether the remedy so provided is the only one to be had recourse to, or whether it is cumulative."

Here, as in that case and for similar reasons, we think the Legislature intended that the summary proceeding pointed out should be the only one.

To hold otherwise would, we think, open an appalling source of litigation, ruinous to all concerned in it, and opposed to the spirit and intention of the Legislature, which, we think, was, to place in the hands of either party interested the right to specific performance of the relief sought, but not damages by suit for non-performance of it.

*Judgment for defendant in exceptions
to declaration.*

EATON V. SHANNON.

Insolvency—Substitutional service of attachment—Judge's power to rescind his order for.

A Judge in Insolvency has power to rescind an order made by him for substitutional service of a writ of attachment; and in this case the Court, on appeal, refused to interfere with an order for such rescission.

Appeal in Insolvency from the decision of the Judge of the County Court of the County of Perth.

The Judge on the 6th of December, 1866, made an order that the writ of attachment issued against Shannon, as an insolvent, should be served by sticking up a true copy of the same in the office of the Clerk of the County Court of the County of Perth, and by leaving another copy with Mrs. Duffie, of St. Mary's, the mother-in-law of the defendant, and that true copies of this order should be served in like manner, and that such service should be deemed good service of the attachment and order.

The affidavits on which this order was made stated that the defendant had left Canada in the year 1862, and had

continued from that time to reside in the United States, and, it was believed, in some part of the State of Pennsylvania, but that his residence could not be discovered, although efforts had been made to find it out, and that the only relation he had, who was known in Canada, was Mrs. Duffie, of St. Mary's, his mother-in-law, and that she had been asked where the defendant's residence was, and although it was believed she knew where it was, she refused to divulge it, and further, that the defendant owned a lot of land in the township of Logan, in the said county.

On the 26th of July, 1867, Shannon petitioned the Judge to set aside the writ of attachment, or the service of it, on various grounds, stating, after alleging several irregularities in the proceedings, that he had never received value for the promissory notes on which the attachment had issued, and that they were barred by the Statute of Limitations; and that he had for the last two years been the owner in fee of lot number 19, in the 14th concession of Logan, and had been for several years before that the lessee of the lot from the Canada Company, and that the property was worth \$1,500: that one Nicholson had been in charge of the lot for him ever since he had left Canada, and had constantly been cognizant of his address in the State of Pennsylvania: that his last place of residence in Canada was on the said lot, where he had resided several months with his family previously to his leaving Canada: that he had visited the farm at least once a year, and sometimes oftener, since his residence in Pennsylvania, and had been at St. Mary's on nearly every occasion of his coming here; and that he had seen and conversed with the plaintiff in his store at St. Mary's, and had done so about two years ago: that his place of residence while absent from Canada had been in the Town of Newcastle, in Pennsylvania, where he was well known, and he could easily have been found if enquired for: that he did not think Mrs. Duffie knew where his residence was, as he had not been on good terms with her: that he had not been aware any proceedings had been taken against him till the day before his

petition, and that he was able and willing to pay every legal claim against him, and that he had not left Canada or remained from it with intent to defraud or delay the plaintiff, or any other person or persons, of any claim he or they had against him.

Upon this application the Judge, on the 26th of July, 1867, issued a summons calling on the assignee to shew cause why the attachment, or the service thereof, and all proceedings under it, should not be set aside for the reasons aforesaid; and upon hearing the parties on the 15th of September he made an order that the order which directed the service of the writ of attachment, the service of the said writ, and all subsequent proceedings, should be set aside for irregularity, and he reserved the question of the costs of such application until the determination of the suit.

Against this order the creditor petitioned, upon the following grounds :

1. That from the paper which he submitted to the Judge he was entitled to the order for substitutional service.

2. That the order could not be rescinded, and especially after the proceedings which had been taken upon it, and after the time which had elapsed since it had been made.

3. That the Judge might appoint any method he might see fit for effecting service of the writ, and having exercised his discretion, it could not be set aside, unless the order for such service had been obtained by fraud.

In Michaelmas Term last, *C. Robinson*, Q.C., shewed cause :—The Judge's order appealed from setting aside the service of the writ was on a matter of practice only, and this Court will not interfere with the decision in such a case : *Tadman v. Wood*, 4 A. & E. 1011. The facts fully justified the order which is appealed from.

J. A. Boyd, contra :—This appeal lies against the order, for an appeal lies generally against all orders, and matters of practice may be the subject of appeal : *Whitaker v. Crocker*, 2 L. M. & P. 76; *Ensor v. Griffin*, 7 C. B. 781.

The original order of the Judge cannot be impeached or

contradicted by new facts: *Kilkenny Railway Company v. Fielden*, 2 L. M. & P. 125. The appellant has not established a full case, for he only shews that his last place of abode was in Logan, and not that that was his last known place of abode.

A. WILSON, J., delivered the judgment of the Court.

The defendant left the Province in 1862, and he was not proceeded against as an insolvent till about the end of 1866.

The Judge had power under the Act of 1865, s. 4, to make the order he issued for service to be made in the manner he had directed; but the suggestion is that these proceedings were not fairly, though regularly, taken.

It is laid down in Arch. Pr., 11 ed., 204, that the order made by a Judge, permitting the plaintiff to proceed upon a summons which has not been personally served, upon its being shewn to him that reasonable efforts have been made to effect personal service, which have not been successful, will not be set aside upon affidavits contradicting the facts disclosed in the affidavit on which the order was made.

In *Lewis v. Padwick* (14 Jur. 226) it was intimated that as the Statute had declared that "in case it shall be made to appear by affidavit to the satisfaction of the Judge, &c.," the Judge shall order a *distringas* to issue; that his order should not be interfered with if it had been made to appear to him, although the affidavit was false in fact, and that the only remedy the party had was by an indictment.

In *Whitaker v. Crocker*, cited on the argument, and reported also in 15 Jur. 385, it was said by the Court in a similar case, "This point has already been decided in *Lewis v. Padwick*: there may be inconveniences on both sides, but the law has elected between them."

In this case the proceeding was commenced against the defendant, for that "being out of the Province he remained out of it with intent to defraud his creditors, or to defeat or delay the remedy of his creditors, or to avoid being arrested or served with legal process."

There may be great inconveniences in setting aside pro-

ceedings after the appointment of an assignee and the transfer of all the debtor's estate to him, especially if the proceedings have gone any length, such as the declaration and payment of dividends, or even further; but proceedings have been set aside in this Province when taken against persons as absconding debtors, who were not so in fact; as for instance, when taken against those whose residence was not in Upper Canada, but who had been for a short time here on business and had returned to their own homes; and so the whole proceedings in bankruptcy, in former times, rested upon the fact and the sufficiency of the petitioning creditor's debt, and often failed because of some objection to the debt; and it might be a very serious matter if no relief could be given against a proceeding in insolvency, however unfounded it might have been, if it was only formal enough to comply with the Statute.

We are not prepared to say a Judge is precluded from entertaining an application to set aside the proceedings, so as to let in the party to dispute the validity of the writ, upon a proper case being made out in his opinion for that purpose.

Even after outlawry the party was afforded relief, "the Court having of late years gone further than heretofore upon motion, the more effectually to expedite justice, save expense, and preserve the credit and character of the defendant:" Tidd's Prac. 9 ed. 139. The power must be cautiously exercised and will at all times be open to revision.

The Judge, upon hearing the parties, thought the order should be superseded, because the defendant was not fraudulently abroad, and because the plaintiff was aware the defendant had a tenant upon his land in Logan, who might have informed the plaintiff of the defendant's residence, if he had been applied to, and who might, if he had refused to give information, have been more properly served with the writ than the mother-in-law of the defendant.

If on such grounds the Judge had declined to interfere, we are not at all sure we should have over-ruled his decision: discretionary matters are better left with those who have firstly to dispose of them, and their decision should be maintained unless it can on safe grounds be impeached.

There are other circumstances in this case which shew that the discretion was not properly exercised: the debtor disputes the validity of the promissory notes in respect of which the claim is rested, and the notes themselves are not proper proveable securities, being more than six years old at the time of the issuing of the writ.

It has not been necessary to consider the very numerous technical preliminary exceptions which were argued for the respondent and were answered by the other side, because we are not of opinion the order appealed from was wrongly made.

The appeal must be dismissed with costs.

Appeal dismissed, with costs.

BRADY V. THE WESTERN INSURANCE CO. (LIMITED).

Fire insurance—Policy not under seal—Agent's power to bind Co. by parol—Waiver of condition—Pleading.

One of the conditions of a fire policy, not under seal, issued to plaintiff by defendants, an Insurance Co., was, that no suit of any kind should be sustained in any Court against the Co. for the recovery of any claim, unless brought within six months after damage occurring to the insured. Within this time plaintiff presented his claim for loss, when it was agreed by parol between him and one D. acting for defendants, that if plaintiff would not prosecute his claim until S. returned from England, defendants would pay the same and take no advantage of the limitation clause above referred to. The insurance had been effected by and through D., and the premiums paid to him, or to S., who was associated with him in the management of the Co., and the policy signed by D. as "manager for the said Co. in Upper Canada," under an express authority from the directors, two of whom subscribed their names to the same opposite a seal, with the name of the Co. upon it. It also appeared that after the expiration of the six months, there had been an actual tender of payment, though of a lesser sum than that claimed, by the agent of defendants to plaintiff: *Held*, that D. had power to bind the Co. as their agent, and that what had taken place between him and plaintiff amounted to a waiver in law of the six months' condition, and that the plaintiff was therefore entitled to recover.

Remarks upon the impropriety of Insurance Companies setting up defences of the kind indicated, instead of any *bona fide* reason that may exist for resisting claims made against them.

Observations on the premature introduction into the declaration of the averment as to the six months' limitation of time, instead of leaving it to be pleaded by defendants.

This was an action on a fire policy, alleged in the declaration to have been made by the defendants under the hand

of their Manager in Upper Canada, who had due and full authority in law to bind the defendants thereby, by so signing the policy on their behalf, as also in all things connected therewith.

One of the conditions in the policy, as set out in the declaration, was, that no suit or action of any kind against the Company for the recovery of any claim under or by virtue of the policy should be sustainable in any Court of law or equity, unless such suit or action were commenced within six months next after any loss or damage occurred; and if any such action should be commenced after the expiration of that time, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim attempted to be enforced.

The declaration then averred that before the expiration of six months from the time of the loss by fire defendants, having had due notice and proof of the said loss and damage, according to the conditions, duly waived the bringing of any such action or suit within the period of six months.

Defendants pleaded, among other pleas, that they did not waive the bringing of an action or suit within six months, nor the said condition in that behalf on the policy indorsed.

The cause was tried at the last Spring Assizes for the County of York, before the Chief Justice of this Court.

The fire happened on the 9th of July, 1865.

The policy stated that the Company was incorporated under the Imperial Act of Parliament, 25 & 26 Vic., cap. 89, and concluded as follows :

“In witness whereof this policy hath been signed under the authority hereto annexed, by Alfio DeGrassi, Manager for the said Company in Upper Canada, this ——— day of ———, 1865.

“A. DEGRASSI,
“*Manager in Upper Canada.*”

“The above Alfio DeGrassi is hereby authorised to sign this policy on behalf of the Western Insurance Company, Limited. In witness whereof the common seal of the said

Company has been hereto affixed, in the presence of the under mentioned Directors thereof, this 23rd day of November, 1865."

To this two Directors subscribed their names, and the Secretary also signed his name, and opposite their names was the impress of a seal stamped upon the paper, with some device usual in such cases, in the centre of the seal, and the words "Western Insurance Company, Limited" around the margin.

Evidence was given as to the alleged waiver to the effect stated in the head note, leave being reserved to defendants to move for a non-suit if the Court should hold it to have been inadmissible.

The jury returned a verdict for the plaintiff, including interest, for \$412 50.

In Easter Term last, *McMichael* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a non-suit entered, pursuant to the leave reserved at the trial, on the ground that the action was brought after the time limited in the policy, and there was no evidence of waiver of that condition: that the evidence offered should not have been admitted, and if admitted it shewed no waiver; and that the agent, by whom it was alleged the condition was waived, had no authority to make such waiver and did not waive the condition: or for a new trial, on the ground of misdirection, on the above grounds.

Robert A. Harrison, Q. C., shewed cause:—This policy is not under seal. There is, perhaps, what may be called a seal to it, but it is not to the agreement between the parties: it is to the authority which the Directors, acting for the Company, confer upon DeGrassi to sign the policy on behalf of the Company, and by virtue of which he did sign it.

The case of *Lambkin v. The Western Assurance Company*, 13 U. C. 237, which was relied upon by the defendants at the trial, does not therefore apply here, for the policy in that case was under seal.

The averment of waiver is a good answer to the non-

performance of this condition: *Pim v. Reid*, 6 M. & G. 1; *Wing v. Harvey*, 23 L. T. 120; *Supple v. Cann*, 9 Ir. C. L. Rep. 1; *Armstrong v. Turquand*, 9 Ir. C. L. Rep. 32; *Thames Iron Works Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358; *Sweeny v. The Trustees of the Promoter Life Assurance Annuity Co.*, 14 Ir. C. L. Rep. 476; *Cameron v. The Monarch Assurance Co.* 7 U. C. C. P. 212. He also referred to *Bullen & Leake*, Prec. 2 ed. 568, *et seq.*, and to the notes.

M. C. Cameron, Q. C., and *McMichael*, contra:—This policy was under seal, and the waiver relied on could not certainly avoid the conditions of a deed. But, even if the policy be considered as a mere agreement in writing, a parol dispensation will not answer, however different an effect acts may have, for they bind by estoppel.

No waiver was properly proved, and no evidence of waiver was admissible.

The case of *Lambkin v. The Western Assurance Company*, before referred to, is a direct authority in favour of the defendants.

A. WILSON, J., delivered the judgment of the Court.

The pleas to the count on the policy are:

1. That the policy is not the policy of the defendants.
2. A denial of the waiver before mentioned.
3. That the property in the policy mentioned was not burned and destroyed by fire.

It will be better to consider whether a waiver or dispensation of the condition relating to the limitation of action has in law and in fact been proved, before considering it as a question of pleading. The policy is not under seal: the evidence sustains a waiver in fact: it remains then to consider whether the waiver was or was not valid in law. It is said not to be valid, because, firstly, it was the mere saying or act of an unauthorized person; and secondly, because it was by word only.

What did take place amounts to this: Before the six months' limitation had expired, and while the plaintiff had

a complete cause of action, it was agreed [and for the present we make no distinction between the Company and Mr. DeGrassi] that if the plaintiff would not prosecute his right at law until Mr. Scott returned from England, the defendants would pay the claim and would take no advantage of the limitation clause, in case the six months expired before the payment was made.

If an action were brought upon this special agreement, the evidence would, I think, maintain it just as stated. There was no breach of the condition of the policy at that time: there was nothing therefore to prevent such an alteration of it as above stated, by the assent of both parties: *Gous v. Lord Nugent* (5 A. & Ad. 58). The defendants would be liable to an action for breach of it: *Nash v. Armstrong* (10 C. B. N. S. 259). But it is, also, available to the plaintiff as an answer to their plea.

In *Pim v. Reid* (6 M. & G. 91), the Judge at *Nisi Prius* held, in an action on a policy not by deed, that the not furnishing a particular statement of loss according to the policy might be dispensed with.

In *Wing v. Hervey* (23 L. T. 120, in appeal in Chancery) it was held that although the life policy not under seal was liable to be forfeited by reason of the person whose life was insured having gone to a foreign country, contrary to the condition of the policy, that this breach was waived by the Company, because after the breach the local agent of the Company, at the place where the policy was effected, had notice of the breach and received the premiums as before the breach, stating that the policy would be perfectly good providing the premiums were regularly paid, and the Company must be deemed to have had constructive notice by the express notice to their agent.

In *Supple v. Cann* (9 Ir. C. L. Rep. 1), to an action on a policy not under seal, the Statute of Limitations was pleaded, and the plaintiff replied, on equitable grounds, that a suit was commenced in Chancery before the expiry of the six years, and a question arose there whether the premiums had been regularly paid, upon which the Court

ordered an issue at law to try the question, and that it would be inequitable to permit this defence under the Statute not to be set up, and it was held to be a good equitable answer to the plea.

In this same case another point arose which is very applicable. The plaintiff in his summons and plaint admitted the non-payment of certain premiums within the required period, and he relied upon the subsequent receipt by the agent of the Company as amounting to a new contract for the revival of the policy, or to a waiver of the default. The Company pleaded a specific mode contained in the policy, by which within a limited period after default the policy could be set up again : *Held*, that the parties were not precluded from waiving the lapse in any other mode they might agree upon.

In *Armstrong v. Turquand* (9 Ir. C. L. Rep. 32), on a plea of fraud to an action on a policy under seal, the plaintiff replied waiver by subsequent receipts of premium after knowledge of the fraud : *Held*, the policy was not absolutely void by the fraud, but only at the election of the Company, and that like a lease under seal they might elect not to create a forfeiture, and that the application was good.

The case of *Lambkin v. The Western Assurance Company* (13 U. C. 237) does not apply, because the policy there was under seal, and the condition as to bringing the action within twelve months, could not therefore have been dispensed with at law except by deed, and the dispensations relied on were by parol only. I think this waiver a valid answer to the defence which is opposed to it.

If the plaintiff had not stated the waiver in his declaration, but had replied it as an equitable answer to a plea setting up the limitation, then, according to the case in 9 Ir. C. L. Rep. 1, it would have been a good replication.

The ordinary defence which may be made to an action to enforce a claim forms no part of the contract between the parties. The agreement that it does, as Lord Brougham said in *Don v. Lippman* (1 C. & F. 1), "supposes that the parties look only to the breach of it. Nothing is more

contrary to good faith than such a supposition, that the contracting party looks only to the period at which the Statute of Limitations will begin to run : it will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness."

In this particular case the parties did contract expressly with respect to the period of limitation ; but not more in this case than in any ordinary case can it be said that the defendants looked only to the breach, and not to the performance of the contract, as the substance of the agreement between them and the plaintiff.

I see no reason why the statutory defence by lapse of time might not be expressly agreed to be waived for forbearance, or for any other good consideration, nor why such waiver might not be replied to a plea setting up the defence, and I see no reason why it may not equally be relied on against any conventional period of limitation. I think, then, the waiver, if made by a competent person to bind the Company, valid in law.

The further question is, whether the agent of the Company had power to bind the Company.

The contract of insurance was made by and through him ; the premiums were paid to him, or to Mr. Scott, whose name is mentioned in the evidence, and who was acting in co-operation with him ; the adjustment of the claim was made, and the payment would also be made by or through him ; for he is named in the policy expressly as "Manager for the said Company in Upper Canada," the Company itself having its principal office in London, England ; the Company have got the benefit of the forbearance which he bargained for, and they are enabled to set up this condition only by reason of his bargain and conduct.

If therefore there be no positive rule of law against such an agent having power by his conduct and bargain to bind the Company, we should hold the Company to be bound. In some of the cases before mentioned the Company was held responsible by their agent's receipt of premiums after the defaults had happened : these were acts, as dis-

tinguished from a mere bargain and the agent's conduct in this case. The *nisi prius* decision in *Pim v. Reid* was not, however, an act, but a course of correspondence by letter, and there a waiver was held to have taken place.

In the present case, too, it must also be considered that there was something more than a bargain: there was a tender of payment made by the agent of the Company, and made without any qualification or reserve after the six months had expired.

We pass no opinion upon the evidence: we are obliged to take it as it was given; nor can we tell what reason may have influenced the Company in setting up this defence. In actions on policies there are often reasons, actual or supposed, which induce Companies to claim a rigid compliance with their conditions, and to jurors and Judges who do not know the secret causes of such resistance, the conduct of the Companies appears to be somewhat "iniquitously legal."* However the real facts may be it is impossible for us to tell; but the Company does appear to be in the unfortunate position we have just referred to. Any person would think that it would be better for the Company to rely upon their actual defence, such as fraud or arson, than seek shelter under a class of conditions which places their conduct in the worst possible light before the public. It may be that fraud or arson is a serious charge, and that the setting of it up might be prejudicial to the defence, if not well maintained by the evidence; but how can such a plea, if pleaded upon reasonable grounds, be anything like so hurtful to the credit of a Company as the evasion of what seems to be a just claim, upon the pretext of *ultra vires*, or upon any other of the many frivolous defences put forward so frequently by such Companies. The argument for the defendants, to be available, must be capable of being pressed to this extent, that the Company could equally claim the right to be acquitted from the payment of this policy, if on the last day of the six months the agent had induced the

* Letter to a Noble Lord.—Burke's Works, vol. 7, fol. 409.

plaintiff to stay his suit until the following day, on a promise that the claim would be paid, and having thus put him over the six months, the agent then claimed to be exempted altogether, because the action was not commenced within the six months.

It would require a strong argument to establish in such a case as the present that such is the law.

I think this agent, the Manager for the Company in Upper Canada, had the power to stipulate for the indulgence which he got, and to bind the Company not to take any advantage of the plaintiff for the indulgence which he gave to them.

There remains a point of pleading which was not raised by the parties, and which, from the conclusion we have come to on the facts, it is not necessary to consider very closely.

The issue we have been discussing in substance, though not in form, is upon the period of limitation.

It is as if in an ordinary action on a promissory note, by payee against maker, the plaintiff had alleged in his declaration that the reason he had not brought his action within six years was, that the defendant before the six years had elapsed agreed for a good consideration not to take advantage of the Statute; and as if the defendant had traversed the making of the new agreement, upon which issue was joined: would the finding of this issue for the defendant be equivalent to a finding on a plea expressly setting up the Statute of Limitations as a defence?

It would shew as a fact that the action was not brought within six years, but it would not shew that the defendant either did or intended to rely upon it as an answer to the action. It rather appears to be a premature allegation—an allegation that should properly have come from the other side, and notwithstanding this averment, it would be for the defendant, if he meant to rest upon the Statute, to plead that the cause of action did not accrue within six years.

It is not a condition precedent to a plaintiff's right of action, that he should aver the action was brought within six years: it is matter subsequent, to be pleaded by the defendant.

There are many cases bearing on the point, and perhaps the plaintiff might have been entitled to judgment *non obstante*, even if the issue had been found by the defendants, or to a repleader.

I think the rule should be discharged.

Rule discharged.

MANNING V. THOMPSON.

Foreign judgment—23 Vic. ch. 24, s. 1—*Onus probandi*.

In an action on a foreign judgment, if the judgment is not impeached or denied, it is *primâ facie* evidence against the defendant.

In this case, which was an action on a judgment obtained by plaintiff against defendant in one of the United States of America, defendant pleaded 1st, that the judgment had been recovered for moneys alleged to have been payable by defendant to plaintiff, for money paid by plaintiff for the use of defendant, and that he was never indebted as alleged; 2nd, Payment before judgment :

Held, J. Wilson, J., *dissentiente*, that the *onus probandi* was upon defendant, who ought to have begun, and that having refused to do so, a verdict was properly entered for the plaintiff.

The plaintiffs declared that on 1st August, 1867, in the Superior Court of Buffalo, in Erie County, in the State of New York, they recovered against the defendant \$623 90, damages, with \$17 36 costs, in all amounting to \$641 26 of money of the United States, which was of the value £116 of the money of Canada.

No cause of action in respect of which the judgment was recovered was mentioned in the declaration.

The defendant pleaded that the judgment was recovered for moneys alleged to be payable by the defendant to the plaintiffs, for money paid by the plaintiffs for the use of the defendant at his request; and that he never was indebted to the plaintiffs for or in respect of the said alleged causes of action, or either of them.

2nd. Payment before judgment recovered.

Issue.

The cause was tried at the last assizes at Guelph, before the Chief Justice. The question arose as to who ought to

begin. The learned Chief Justice ruled that the defendant ought to begin, as the issue was on him. Defendant objected and would not begin, whereupon the jury were directed to find for the plaintiffs for the amount of the judgment, \$464. Leave was reserved to the defendant to move for misdirection in the above respect.

Idington obtained a rule *nisi* accordingly, for a new trial.

Palmer shewed cause, citing *Waydell v. Provincial Insurance Co.*, 21 U. C. 612; *Munro v. Pilkington*, 31 L. J. Q. B. 81; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Walker v. Witter*, 1 Doug. 1; B. & L. Prec. 2 ed. 166, 167, *Notes*, 528, 530; *Sel. N. P.* last ed. 72, 571; *Tay. Ev.* 3 ed. p. 94; 23 Vic. ch. 24.

Idington, contra, cited *Glover v. Dixon*, 9 Ex. 158; *Davis v. Chapman*, 2 M. & G. 921; *Barber v. Lamb*, 8 C. B. N. S. 95; *Philpott v. Adams*, 7 H. & N. 888.

A. WILSON, J.—The Act 23 Vic., ch. 24, sec. 1, which provides that in any suit brought here upon a foreign judgment or decree [not obtained in Lower Canada], “any defence set up, or that might have been set up, to the original suit, may be pleaded to the suit on the judgment or decree,” does no more in my opinion than enable a defendant to do just what is said, that is, to *plead* any defence to the action on the judgment which he could have pleaded in the original suit. It does not alter the effect of the recovery of the foreign judgment, which is that it is *primâ facie* evidence of a valid cause of action against the defendant: that remains as before.

In an action upon a foreign judgment the plaintiff proves his *primâ facie* case by producing and proving the judgment, if it be denied; and if it be not denied, but some defence be set up to the original cause of action, the plaintiff, by reason of the judgment being *primâ facie* evidence for him, has nothing to prove until the defendant impeaches the *primâ facie* case by evidence affecting the original ground of action.

If he do not sufficiently do this, the plaintiff's *primâ facie* case stands undisputed and he recovers.

It is somewhat like an action on a promissory note, to which the defendant pleads fraud in the making of the note and want of value. The plaintiff's *primâ facie* case is admitted, at any rate proved by the production of the note, and it rests on the defendant to impeach it by evidence of fraud; and so the judgment like the promissory note is evidence of something, and to some extent good until impeached.

The defendant in this case, by alleging the original cause of action was for money had and received, and that he was not indebted to the plaintiff in respect thereof, has undertaken to shew he was not indebted; but he has undertaken to do this, not as in an ordinary action where the plaintiff must prove his claim, nothing standing in his favour in respect of it, that is, by answering or repelling the case made against him, but by producing proof in the first instance, and shewing that the *primâ facie* case which the judgment makes against him should not prevail, because in fact he did not owe the money which was sought from him and recovered in the first action. He has the burden of proving a negative substantially; but this must frequently happen. Suppose, in an action for goods sold, or on a promissory note, he denied his having got the goods or having made the note; if the plaintiff proved the admission by the defendant that he had got the goods, or that he had made the note, the defendant would then be driven to prove a negative, for he might not be able directly to attack the credit of the witness who proved his admission. Now, in what worse or different position would he be placed in such a case than he is placed by this judgment?

This negative evidence, cast upon the defendant from the judgment being *primâ facie* evidence against him, it is necessary as a part of his case he should produce. The substance of this plea is, "It is true you have a judgment against me, but I did not owe you the money you claimed from me in that action, and for which you recovered against me." This negative averment is the very substance of the

plea, admitting the judgment, and in such a case the onus of proving that averment rests upon the party making it : per Alderson, B., in *Harvey v. Towers* (6 Exch. 656). And so, if the plaintiff were to aver the sanity of a person at a certain time, and the defendant were to traverse it, the defendant would be bound to prove the incompetency, because the presumption would be that the man was sane till the contrary was proved : *Sutton v. Sadler* (3 C. B. N.S. 87).

In this case the presumption is that it is a valid recovery : the defendant, who desires to rebut this presumption, is therefore bound, although it is the proof of a negative, to remove the presumption : if he do not succeed in doing so, or do not attempt it, the presumption remains, and the plaintiff recovers on his unanswered *prima facie* case.

In the *Bank of Australasia v. Nias* (16 Q. B. 736) Lord Campbell, C. J., speaks of the *onus probandi* being shifted to the defendant, if the merits of the original action were to be retried ; and he speaks of the many hardships which must be thrown on plaintiffs by a fresh investigation, when witnesses and documents may be in another quarter of the globe, and difficult as well to discover as to have at the Court for the new trial. This difficulty will exist here no doubt, as well when the *onus probandi* is on the defendant as on the plaintiff ; but it will certainly be greater if cast upon the plaintiff in the first instance, for the defendant might put in such a plea to make it necessary that the plaintiff should prove his case, in hope of defeating him by the hardship and expense it would entail on him, without any intention on his part of really contesting it, and we should save the plaintiff from this, if possible. It will be sufficiently hard upon him to do this in rebuttal of the evidence, if one be made out which he should reasonably answer. It is not necessary to invert the rule of evidence or order of proceeding to give the fullest effect to the Statute, which, as far as it goes, is very greatly in favour of the defendant.

I was in doubt at first on this question, from the strong language of the Statute, but upon consideration I think my present view is the correct one, and that the ruling of the

learned Chief Justice at the trial was correct in law, and that the rule should be discharged.

RICHARDS, C. J.—I have but little to add to the observations of my learned brother on my right, Mr. Justice Adam Wilson. I do not think the Legislature intended that no force or effect should be given to foreign judgments in the Courts of this Country. If such had been the intention of our Local Parliament, it would have been easy to have declared that no action should be brought in the Courts of the Province on the judgment of any foreign Court. If it were intended that the judgment of the foreign Court should not, on being proved or admitted, be evidence to sustain to some extent the case of a plaintiff suing on such judgment in this country, it would not have been difficult to have enacted that in any action brought on a foreign judgment, the plaintiff should be compelled to prove his right to recover for the cause of action recovered in the judgment, in the same manner as if such action was an action to recover the original demand in this Court. The reasonable interpretation of our Statute seems to be, that it was intended that the merits of the case, on which a foreign Court had regularly adjudicated between the parties, might be again put in issue and retried in our own Courts, but the *onus probandi* is to be shifted.

In the *Bank of Australasia v. Nias* (16 Q. B. 736) Lord Campbell speaks in very strong language of the inconvenience of retrying cases in England that had been tried in a foreign country, even when the *onus probandi* is shifted. It is true he is speaking of a judgment of a Colonial Court, where there may be an appeal to the Queen in Council, but his observations in the main will apply as well to the review of the judgment of a foreign Court in the territorial sense: “Although the judgment is perfectly regular and just, it may be set aside if the same questions are to be again submitted to a jury. Although the *onus probandi* is now to be shifted to the defendant, he is to be at liberty to adduce new witnesses, whom he may suborn, to prove that the Company

never made the promises which were the foundation of the judgment, or that these promises were obtained by the fraud and covin of the plaintiffs. The documents, by which the original cause of action was established in a distant part of the globe, may be lost or not forthcoming, and the witnesses, who truly swore to it, may be dead or absent. * * * The defendant may, if he have the opportunity of again contesting his liability, from the loss of evidence by the plaintiffs, or from a temptation to bring forward false evidence himself, unconscientiously resist the payment of a just demand which had been solemnly adjudicated upon by a competent tribunal. * * * These pleas (of fraud and covin in obtaining the judgment) must lead to a new trial, not to an appeal upon the merits of the judgment which has been pronounced. If it were to be merely an appeal, how is the same evidence to be again laid before a jury, and how are the incidental questions of law which must arise to be disposed of? If the judgment was given *by a Court* in a foreign country, or in the Court of one of our own colonies governed by foreign law, how is the cause to be retried at *Nisi Prius*?" Arguments and observations to the same effect in the note to the *Duchess of Kingston's Case* (2 Smith's Leading Cases), and by Mr. Justice Story in his *Conflict of Laws*, are referred to in *Taylor on Evidence*, 2nd ed. p. 1443.

Now, if the foreign judgment is not to be taken as *primâ facie* establishing the plaintiffs' case, the evils so forcibly portrayed by the language used by Lord Campbell, in permitting the defence referred to in that case, where the *onus probandi* is cast on the defendant, would be much aggravated if the *onus* of proof is to be shifted, as is contended is the proper conclusion to arrive at from our Statute.

I do not think our Legislature wished to violate the general comity of nations so far as to assume that no foreign judgment could be relied upon as establishing a *primâ facie* case in our Courts. They have gone a great way when they declare that such judgments may be impeached in our Courts on the same grounds as set up in the foreign Court,

and unless the will of the Legislature on the subject is unmis- takably declared, we as a Court ought not to hold that a foreign judgment does not make such a *primâ facie* case against a defendant, when sued upon in this country, when he has been properly served and notified of the proceedings against him in a foreign country.

I do not understand that our Statute deprives a defendant sued here on a foreign judgment of the right of impeaching it on the grounds that the foreign Court had no jurisdiction over the subject matter of the suit; or that the defendant had never been summoned to answer and had no opportunity of making his defence; or that the judgment was fraudulently obtained. All that they intend by the Statute seems to be to permit the defendant to shew to the satisfaction of the Courts here that he was not indebted to the plaintiff for or in respect to the cause of action for which judgment was obtained against him in the foreign Court. If the action like the present one in the foreign Court be for a money demand, he may then, according to his pleadings, shew that he never was indebted, or that he had paid the debt, or that he had a set off, if such a defence could have properly been set up in the original action. I think we may give effect to the Statute without taking the extreme course of denying any force or effect to the decisions of the foreign tribunal.

I think the ruling by the learned Chief Justice that the judgment of the Court, not being impeached or denied, made out a *primâ facie* case against the defendant, was correct, and in the absence of any evidence to sustain the pleas filed by the defendant, the verdict was properly entered for the plaintiff for the amount recovered by him in the foreign Court.

The rule for a new trial must be discharged.

J. WILSON, J.—The plea was pleaded under our Statute 23 Vic., cap. 24, sec. 1, which enacts that “in any suit brought in another section of the Province upon a foreign judgment or decree not obtained in another section of the

Province, except as mentioned in the Act, any defence set up, or that might have been set up to the original suit, *may be pleaded to the suit* on the judgment or decree."

The question is, on whom is the *onus probandi* on the issue in this plea?

The declaration does not set out the cause of action. In the plea the first affirmative allegation is, that the judgment was recovered for moneys alleged to be payable by the defendant to the plaintiffs for money paid by the plaintiffs for the use of the defendant at his request. The proof of this allegation was on the defendant, and so was the proof of his plea of payment; but he pleaded that he never was so indebted, the affirmative of which was for the plaintiffs to prove.

The ruling of the learned Chief Justice was therefore strictly right, that it was for the defendant to begin in this case. But the real question the parties intended to raise was, whether the plaintiffs were bound to prove their cause of action under this plea, as if no judgment had been recovered, or whether the defendant was bound by negative evidence to prove he was not indebted to the plaintiffs. That in a suit for money paid by the plaintiffs for the use of the defendant *never indebted* would have been a proper plea, and that under it the *onus probandi* would have rested on the plaintiff, admits of no doubt; but the Statute gives the right to the defendant, notwithstanding the judgment, to deny the cause of action, and I think it follows the plaintiff must prove his cause of action, as he would have been obliged to do in the action in which he recovered the judgment.

Before this Statute, except in cases where the recovery was had contrary to the principles of natural justice, the defendant was not permitted again to litigate what a foreign Court of competent jurisdiction had determined. In this very Statute the Legislature distinguished between foreign judgments and judgments recovered either in Upper or Lower Canada. In the latter, where the service of process on the defendant has been personal, he is not permitted to

plead any defence which might have been set up in the original suit; but where the service has not been personal and no defence has been made, then only he may make any defence to a suit on such a judgment as he might have set up in the original suit.

We all agree that this Statute gives the right to contest the cause of action upon which a foreign judgment has been obtained, if the defence was one which might be set up to that action. If so, with great deference to the opinions of my learned brothers, I think that all that is incident to it must follow; but it is incident to the denial of a cause of action that the plaintiff must prove it.

I have not failed to see the inconvenience and, in many cases, the injustice which may be done to plaintiffs having foreign judgments against the residents of this Province. This is well pointed out by Lord Campbell in his judgment in the *Bank of Australasia v. Nias* (16 Q. B. 736). I think the Legislature meant something more than shifting the *onus probandi* from the plaintiffs to the defendant. This case presents the matter in its simplest form. The plaintiff says, I have a judgment against you, for I paid money for you. The defendant says, I deny you paid the money. I think the plaintiff should begin and prove he paid the money. My brethren say the defendant should prove he does not owe it by a negative proof. I am glad they have been able to adopt the opinions they have: it will be productive of less injustice than would be the case if they had taken my view of it.

For the law as it stood before this Act see *Ferguson v. Mahon* (11 A. & E. 179); *Kelsall v. Marshall* (1 C. B. N. S. 241).

Per Curiam—*Rule discharged.*

WILLIAMSON V. THE GRAND TRUNK RAILWAY CO.

Railway Co.—Forcible removal by conductor—Liability of Co. for assault—Remote damages.

Where the conductor of a Railway Company forcibly, and without excuse for so doing, removes from a train a passenger who has paid his fare, he is liable for the assault, and the doctrine of *respondeat superior* applies to the Company. But, where in the course of such removal, and while in the act of leaving the car, plaintiff slipped and was injured, *Held*, that defendants were not liable for the injuries sustained by him, as his removal was not the proximate, but the remote cause of the accident, and the damages awarded were, therefore, too remote.

The second count of the declaration stated that plaintiff, being a passenger on defendants' cars going from Stratford to Toronto, was by defendants or their servants forcibly, wrongfully and with violence, put out of said cars before they reached Toronto, whereby plaintiff was wounded and injured and incurred loss of time and expense in the cure of his wounds and injuries, and paid large sums in and about his nursing and medical attendance.

Defendants pleaded, in effect, that in the course of transit between Stratford and Toronto the conductor of the train asked plaintiff for his ticket, which plaintiff refused to produce and did not produce to him, and that a short time before the arrival of the train at Guelph, the conductor demanded from plaintiff his fare or a ticket, and although a reasonable time was given him, plaintiff would not and did not purchase any ticket, or pay his fare, but refused to do either, whereupon the conductor told him that unless he did so he must leave the train at Guelph, at which station, on arrival there, plaintiff got off, and that refusing to pay his fare, the conductor so put him off the train, using no unnecessary violence, but first requesting him to leave the train.

Issue.

The cause was brought down to trial at the Assizes for the County of Oxford, in the Fall of 1866, before A. Wilson, J., when it was agreed that it should be referred to arbitration, which was accordingly done.

The arbitrator, after disposing of the issues on the first

count in favour of the plaintiff, also found in his favour on all the issues on the second count, and fixed the damages at \$2,400, which he ordered to be paid to him by the defendants, and, in accordance with the request of the defendants, in pursuance of the power in the order of reference, after finding the facts referred to in the judgment, he stated the following questions for the consideration of the Court :

1st. Whether under the facts the defendants were liable for the acts of the conductor in removing the plaintiff, he having paid his fare ; and 2nd, assuming them to be so liable, whether they were not also liable for the injuries sustained by him in his fall.

R. A. Harrison, Q. C., for the plaintiff, cited *Read v. Coker*, 13 C. B. 800 ; *Christopherson v. Bare*, 11 Q. B. 473 ; *Limpas v. The Liverpool General Omnibus Co.*, 1 H. & C. 526 ; *Regina v. Stephens*, L. R. 1 Q. B. 702 ; *Mullett v. Mason*, L. R. 1 C. P. 599 ; *Bodley v. Reynolds*, 8 Q. B. 779 ; *O'Hanlan v. The G. W. R. Co.*, 12 L. T. N. S. 490 ; *Greenland v. Chaplin*, 5 Ex. 243 ; *Barnes v. Ward*, 9 C. B. 392 ; *Mayne on Damages*, 15, 22 ; *Anon.* 1 Ven. 264 ; *Seymour v. Greenwood*, 7 H. & N. 355.

M. C. Cameron, Q. C., contra, referred to C. S. C. ch. 66, secs. 97, 98, 106.

RICHARDS, C. J., delivered the judgment of the Court.

As to the first point, I think, in the absence of anything to the contrary, we must assume that the conductor is the agent of the defendants' Company, authorised by them to do all legal acts for the proper management of the business of collecting the tickets and fares from passengers, preserving order, and regulating the running of the trains, and authorized by them, as well as by the Act of Parliament referred to by Mr. Cameron, to remove persons from the cars who misconduct themselves or have not paid their fare. This being within the general scope of his authority, if, in assuming to carry out what he is legally empowered to do, and in relation to which he may be

considered the general agent of the Company, he forcibly removes a passenger from the cars, who has paid his fare, without any excuse for so doing, it seems to me he must be liable for the assault, and that the doctrine of *respondeat superior* applies to the defendants.

Then, as to the damages for the injury sustained by the plaintiff while leaving the car:—The facts on this point necessary to be referred to in the special finding of the arbitrator are as follows: that plaintiff paid his fare from Stratford to Toronto, and received his ticket which he delivered to the conductor, who denied having received it, and insisted that plaintiff should either produce the ticket, pay the fare to Toronto, or leave the cars at Guelph: that plaintiff insisted he had delivered his ticket to the conductor, and refused either to pay his fare again or leave the cars: that, on the arrival of the train at Guelph, the conductor ordered plaintiff to leave the cars, and when he refused the conductor placed his hand on his shoulder to compel him to go, and plaintiff then rose from his seat in the car and followed the conductor out of the car: that the conductor did not strike plaintiff, nor use any violence to him, but plaintiff left the car under the compulsion of the conductor, as aforesaid, and under the fear of violence, and whilst so leaving the car slipped on the steps and sustained the injuries and damages charged in the second count.

Was the removal of the plaintiff from the cars the *proxima causa* of the accident, or the remote cause? The finding of the arbitrator fails to shew the immediate cause of the accident further than that in leaving the car plaintiff slipped on the steps and sustained the injuries complained of. It is not said that at the time this occurred he was being hurried by the conductor, or where the latter was (probably before him), or that anything further than what has been stated was done by the servants of the Company to cause the accident.

Suppose plaintiff had been illegally made a prisoner by a Sheriff's officer, and in following him out of the car plaintiff had slipped and injured himself, would the officer, if otherwise liable for the illegal arrest, be liable for that

accident? I should think not. The case stated by Lord Ellenborough in *Boyce v. Bailiffe* (1 Camp. 58), which used to be mentioned by Lord Alvenly, will shew how the doctrine of remote damages has been applied. In that case the plaintiff complained of false imprisonment *per quod* being confined on shore he lost a lieutenantancy (*Bull N. P.* 6, 7, *Tidd's Practice*, 399, 400). In the case referred to in Campbell's reports, the plaintiff was a passenger on board a ship from Bombay to London. He conceived he had been ill-used by the defendant, the captain, who had forbidden him to walk on the poop. When near the Cape of Good Hope they saw two vessels they supposed to be enemies. Defendant ordered plaintiff, amongst other passengers, to the poop, where they were to fight with small arms. He refused to go on the poop after having been forbidden to do so, but offered to fight in any other part of the ship with his messmates, when the captain put him in irons for his contumacy, carried him to the poop and kept him there the whole night. Next morning no enemy appeared, and he was released. This happened on the 11th May. On the 17th June the ship arrived safe at St. Helena, the plaintiff quitted her and gave £100 for his passage home on another ship. There was no justification on the record, and plaintiff insisted on his right to recover the £100 as special damage. It was urged his leaving the ship was no necessary consequence of the trespass. On the other side, it was argued he could not remain on board with the respectability and comfort he had enjoyed before, or might enjoy in another ship, and this was impossible after the outrage he had suffered. Lord Ellenborough held that the imprisonment was not the *proxima causa* of the transshipment: it was remote in point of time: he was not driven to it to relieve himself from any great peril or grievance: to justify transshipping himself and throwing the expense of doing so on another, the injury must continue down to the moment of his leaving the first ship.

The recent case of *Glover v. The London and South-Western Railway Co.* (17 L. T. N. S. 139 Q. B.), decided

on the 3rd of November of this year, affords some analogy to the case before us. The first count in that declaration stated that defendants forced the plaintiff out of a carriage of theirs, in which he then was lawfully a passenger, whereby he lost a pair of race glasses. Second count, *trover* for the glassess, and third count, on which nothing turned, breach of agreement to carry. There was a plea of justification, amongst other pleas, that he was travelling without a ticket, as to the second count, not guilty.

At the trial before Cockburn, C.J., the plea of justification failed, as it appeared the plaintiff was not travelling without a ticket, but the ticket was divided into two pieces, and it appeared to have been done fraudulently to enable plaintiff's friend to travel with him, with only the one ticket between them.

The Chief Justice directed a verdict for plaintiff, which the jury found, but only for nominal damages—20s. Plaintiff contended he was entitled to recover the value of the glass, £7. Leave was given to move to increase the verdict accordingly. In giving judgment Chief Justice Cockburn said: "If the loss of property which a man has under his own protection, is the immediate and necessary consequence of the violence offered to him, that is within the range of the damages: a jury may award from the wrongful act of violence; and if we were satisfied that the loss of the glass proceeded from the violence offered by the Company's servants, we should come to a conclusion in favour of the plaintiff. The case, however, is not that of a violent seizure of the person, in the course of which some article of value drops from the person, and is consequently lost. There the loss of the property is the immediate result of the violence offered to the person. So, if a man has property under his personal protection, and he is dragged away under circumstances which render it impossible for him to take it with him, and it is consequently lost. Here, however, the case is wholly different. The plaintiff being called upon to leave the carriage and refusing to do so, is forcibly removed without excessive violence, and under the belief that he was

rightfully removed, although, as it turned out, it was wrongful. If he had at the time asked for his glass, or said he had left it in the carriage, he would probably at once have got it: therefore, it appears that it was his own fault that he did not get it and that it was left in the carriage. It follows that damage for its loss would be too remote, and that therefore he is not entitled to recover it." Lush, J., said, "The law is, the loss must be the direct and immediate result of the wrongful act, and here it was not so."

Suppose the plaintiff in going out of the carriage had been met by some person, who from accident or design knocked him off the car, would that have made the defendants liable for the injuries he had received in falling from the carriage? Or, after leaving the carriage and station of defendants, he had been injured on the highway where the defendants had no power to regulate or control his proceedings? In neither case would the defendants probably be held liable. But here the accident occurred whilst he was yet on, though not in the carriage, under the control of defendants' servant, and apparently submitting to the power which he supposed the conductor possessed and would exercise to put him off the car by force, and whilst so proceeding he falls and is injured in the very act of leaving the car. The injury here seems to be the immediate result of the wrongful act, if that is putting him off the car; but is it the *direct* result as well? It may have been caused by his own want of care or caution, or his own recklessness. It is not shewn by the finding of the arbitrator how this was. The result of the cases is stated in *Mayne on Damages*, as follows: "The first and only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendants' act. It will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act; or, in case of contract, if it appears to have been contemplated by both parties. When neither of these elements exists the damages are said to be too remote."—*Mayne on Damages*, p. 15.

On the whole, though not by any means free from doubt

in the present state of authorities on the subject, I think the plaintiff is not entitled to recover the damages assessed by the arbitrator on the second count of the declaration, and as to that the finding should be for the defendant.

Judgment accordingly.

RE PARR, AN INSOLVENT.

Insolvency—Preferential assignment in 1857—Neglect to keep proper books of account.—Reference back to Judge in Insolvency.—Practice.

The Judge in Insolvency refused an insolvent his discharge on the grounds, (1.) That he had made a preferential assignment in the year 1857, (2) Because he had kept no books of account shewing receipts and disbursements of cash, and such other books as were suitable for his trade :—*Held*, as to the former ground, that it was not sustainable, for there was no law against it when made ; and that as to the latter, considering the short period which had intervened between the passing of the Act of 1864 and the application for discharge (some three months only), and the inconsiderable nature of the business in which he was engaged, the insolvent should not have been so severely dealt with, though this was a matter wholly in the discretion of the Judge in Insolvency. But as the Judge, though doubtful as to it, had not enquired into the *bona fides* with which the assignment of 1857 had been made, and of the disposition of his property under it, the case was referred back to him for re-consideration on these points.

Semble, as to this assignment, that it could be impeached under subsec. 6 of sec. 9 of the Insolvent Act only upon the ground that by it the insolvent had fraudulently retained and concealed some portion of his estate, or had been guilty of evasion, &c., in his examination as to his effects.

Quere, whether fraud committed *before* the Insolvent Act is fraud “ within the meaning of the Act,” so as to make it a valid ground of opposition to a debtor’s discharge, so long as he fully complies with all the other requirements of that Act.

The Insolvent Act does not require the petition in appeal to be signed by the insolvent or his attorney.

Notice must under that Act be served on the Assignee of the day on which the petition will be presented to the Court.

The petition must be addressed to the Court, not to the Chief Justice : the latter is an irregularity, which, however, may probably be corrected.

The neglect on the part of the Assignee to file the papers on or before the day of presenting the petition is no reason for rejecting the appeal, though it may be a reason for enlarging the hearing, and proceeding against the Assignee for his neglect or contempt.

Points not taken in the Court below are not open to parties before the Appellate Court.

Semble, that the more proper mode of raising technical objections to the proceedings in cases of this kind is to move a rule to set the proceedings aside, instead of urging the objections on the argument of the merits.

APPEAL in Insolvency from the County Court Judge of the County of Oxford.

The Judge refused the insolvent his discharge, because he had made a preferential assignment, and because he had not kept an account book shewing his receipts and disbursements of cash, and such other books of account as were suitable to his trade.

The insolvent appealed against the order refusing his discharge, upon the following grounds :

1. That as no claim was filed on behalf of any creditor, no creditor should have been allowed to oppose the discharge.

2. That the alleged preferential assignment, being dated the 7th of July, 1867, the Statute respecting preferential assignments did not apply to this, a precedent transaction.

3. The said assignment was not a fraudulent one within the meaning of the Act.

4. It did not appear that any of the creditors had become creditors since the assignment of 1857, or since the passing of the Insolvent Act.

5. If the insolvent should have kept books of account, the discharge should not, on the evidence, have been refused absolutely.

J. B. Read, for the appellant :—

As no creditor proved, none should have been heard against the discharge : *Re Sharpe*, Chancery Chamber Rep. 75 ; *Re Monk*, 10 L. T. N. S. 634.

The assignment alleged to have been preferential was made before the 22 Vic. ch. 96, sec. 19 (Consolidated Statutes for Upper Canada, ch. 26, sec. 18), and cannot therefore be affected by that Statute : *Young v. Christie*, 7 Grant. 312 ; *Taylor v. Whittemore*, 10, U. C. 440 ; *Bank of Toronto v. Eccles*, 2 Err. and App. 53.

As to not keeping books of account, the Insolvent Act was passed on the 30th of June, 1864, and the insolvent made his assignment under that Act in September following, and considering the few transactions he had in his small business during that time, and that the provisions of the Act were scarcely known, he ought not on that ground to have been refused his discharge forever.

He also referred to the following authorities : *Ex parte Holden*, 6. L. T. N. S. 673 ; *Re Delaware*, ibid. 486 ; *Ex parte Shotter*, ibid. 136 ; *Re McCallum*, 14, L. T. N. S. 172 ; *Ex parte Hartman*, 15 L. T. N. S. 640 ; *Re Smith*, 3 U. C. L. J. N. S. 153.

E. Crombie, for Spencer (creditor) :—The appeal is open to objection on the following grounds :

1. The petition is not signed by the insolvent or his attorney.

2. No notice was served on the Assignee of the day on which the petition would be presented to the Court, which must be within the first four days of the term.

3. The petition is not to the Court, but to the Chief Justice only.

4. The papers have not been filed by the Assignee on or before the day of presenting the petition.

Then, as to the merits :

There was no objection in the Court below that no creditor had proved and therefore could not be heard against the application for discharge, and so it is not an objection now open to the insolvent.

The Insolvent Act does not require that the creditor shall prove his claim to authorize him to dispute the discharge, for by sec. 9, No. 11, any creditor may oppose it. The English Act is different, and therefore the English decisions do not apply.

The insolvent having returned Mr. Spencer as one of his creditors, and never having denied his claim, cannot now dispute it.

The Judge had no power to grant a discharge when there was no estate.

The insolvent should have kept books of account from the passing of the Act until he took the benefit of it : *Re Lyster*, 9 L. T. N. S. 92 ; *Re Lambe* 3. U. C. L. J. N. S. 18. The debt was incurred after the making of the preferential assignment of July 1857, and when the party was insolvent. He has not given an account of what he did with notes to

the amount of £248 made for his accommodation by the assignees under the assignment of 1857 : In *Re Sellers* 27 L. J. Bk 14 ; *Re Neumark*, 6 L. T. N. S. 755 ; *Ex parte Hewitt re Drinkwater*, 6 L. T. N. S. 730.

McMichael, for McIntyre and Gunn (creditors) :—It is said the creditors have not proved their claims. Their claims are, however, in before the Judge, and they have been called upon by the notice of appeal to show cause. There is no evidence in fact that they have not proved their debts. This petition has not been signed : *Anon.* 5, L. T. N. S. 527.

The Judge determined that the business the insolvent was carrying on was his own business, though in the name of another, and that he had not given up all his estate.

Read, in reply :

If the appeal be irregular, the motion should have been to strike the case out.

A. WILSON, J. delivered the judgment of the Court.

When the assignment of July, 1857 was made, it was not void by any Statute then in force in this Province, nor by the Common Law, by reason of a preference being given in it to any particular creditor, and no Statute that has since been passed has made invalid those deeds which were valid when they were made ; and considering the short period which elapsed between the time when the insolvent commenced proceedings under the Statute in September and the passing of the Act in the June previous, especially in the not very large business in which the insolvent was engaged during that period, the not keeping of proper account books would seem to have been adequately punished [if punished at all] by the suspension of the discharge for a limited time, rather than by the absolute denial of the discharge altogether.

Upon these two grounds the learned Judge, I think, based his judgment. The latter was one entirely for his discretion ; but it appears to me it should not have been so strongly dealt with under the circumstances. The former

ground of fraudulent preference was not sustainable, for there was no law against it when made.

It might, however, have been a conveyance made to defeat or delay creditors under the Statute of Elizabeth, although made to a creditor. The assignees under it were not creditors in the proper acceptance of the term at that time : they were sureties for the debtor, and as such sureties they might properly have taken indemnity of this nature ; but the intention with which that was done was a subject for enquiry, and it rather appears the learned Judge was not quite satisfied as to the *bona fides* of this former assignment, though he did not think he was called upon to pronounce upon it, from the conclusion which he came to on the other facts of the case.

Under any circumstances, then, we could not make an order that the learned Judge should grant the insolvent's discharge, for we find he has not yet fully considered the *bona fides* of the insolvent's conduct in making the assignment of 1857, and of the disposition of his property under it ; for he may still have it, or some portion of it, under his control, while it should be made applicable to the satisfaction of his debts.

So far as the first assignment is concerned, it would appear it can be impeached under section 9 of the Insolvent Act, sub-section 6, only on the ground that by it the insolvent has fraudulently retained and concealed some part of his estate, or has been guilty of evasion, &c., in his examination as to his effects ; and these grounds will equally apply, whether such an assignment was made or not. I am not satisfied that fraud committed before the passing of that Act is fraud 'within the meaning of the Act,' so as to make it a valid ground of opposition to a debtors discharge, so long as he fully complies with all the other requirements of that section.

A fraudulent preference *before* the Act of 1864 may be impeached as void, independently of that Act ; but it does not follow because it was fraudulent before the Act, that such former fraud is a good ground of opposition to a discharge

under the Act. It rather seems the intention of the Legislature was to make the penal consequences, the refusal to discharge the insolvent from his liabilities, to fall upon those who, after the Act and with the knowledge of the penalty before them, should wilfully break the law, than to punish those beyond the measure of the law, as it stood when they violated it, by an *ex post facto* judgment. This, however, is my own opinion, and will not conclude the learned Judge from taking any view he pleases upon the question.

The case, we think, should be disposed of as before stated ; but, as several technical objections were taken to the formality and the regularity of the proceedings, it may be better to notice them, as the practice is very unsettled in such cases, and difficulties of the kind are presented on almost every occasion.

Perhaps the more proper way would be to move a rule purposely to set aside the proceedings, than to raise such points in the course of the argument on the merits.

The course of proceeding in appeal from any order of a Judge [1865, s. 15] is :

1. To give notice to the opposite party and Assignee within eight days from the day on which the judgment of the Judge is rendered, that the party complaining desires or intends to appeal from the order complained of, stating the time and place when the application will be made: 1864, sec. 7, sub sec. 3; 1865, sec. 15.

2. To apply upon such notice for the allowance of the appeal: *Ib.*

3. To produce before the Judge, or to require the Assignee to attend before the Judge, at the time and place indicated in the notice, and to produce before the Judge all the evidence, &c., having reference to the matter in dispute: [1864, sec. 7 and sub sec. 2.] This ground is made up from very scanty enactments on the point; for something must be submitted to the Judge, to enable him to say whether he will allow it or not.

4. To obtain the allowance of such appeal by a Judge of any of the Courts to which such appeal may be made, who

will proceed as he may be advised under 1864, sec. 7, sub-sec. 2.

5. If the appeal be allowed, to cause security, within five days after the allowance of appeal, to be given before the Judge by two sufficient securities, that he will duly prosecute such appeal and pay all costs incurred by reason thereof by the respondent: 1864, sec. 7, sub-sec. 3.

6. To prepare a petition in appeal, setting forth the petition to the Judge of the County Court and his decision thereon, and praying for its revision.

7. To serve, within eight days after the allowance of appeal, upon the opposite party and upon the assignee a copy of such petition in appeal, and also a notice of the day on which the petition is to be presented: 1864, sec. 7 sub-sec. 3.

8. To present the petition in appeal, when to a Judge, within ten days after putting in security; and when the appeal is to a Court, within the first four days of the term next following the putting in of the security: 1864, sec. 7, sub-sec. 4.

9. The assignee shall, on or before the day of the presentation of the petition, file in the office of the Court of Appeal, or of the Court to which the Judge appealed to belongs, the evidence, papers and documents which have been previously produced before the Judge: 1864, sec. 7, sub-sec. 4.

10. And thereupon the appeal shall be proceeded with and decided according to the practice of the Court: 1864, sec. 7, sub-sec. 4.

And the costs in appeal shall be in the discretion of the Court or of the Judge appealed to: 1864, sec. 7, sub-sec. 6.

Now as to the exceptions:

1. That the petition is not signed by the insolvent or his attorney.

The Statute does not require it to be signed.

The Bankruptcy rules in England provide for its being signed and verified: Arch's Bankruptcy Practice, 11 ed., fol. 468 *et seq.* (1856).

2. That no notice was served on the assignee of the day on which his petition would be presented to the Court.

This is expressly required by 1864, sec. 7. sub-sec. 3.

The notices of setting down for argument may be assumed to be sufficient in this case.

3. That the petition is not to the Court, but to the Chief Justice only.

This is an irregularity which may probably be corrected, but it is an irregularity.

The writ of *habeas corpus cum causa*, when so much in use, was made returnable before the Chief Justice, yet any of the other Judges in his absence might commit the defendant to the prison of the Court: *Tidd's Practice*, 9th Ed. 349. Here, both a Judge and the Court have jurisdiction, and it does not appear the Court has been appealed to.

4. That the assignee has not filed the papers on or before the day of presenting the petition.

This can be no reason for rejecting the appeal: it may be a reason for enlarging the hearing, and taking proceedings against the assignee for his neglect or contempt.

The case was also argued on other points which we do not feel obliged to entertain: Firstly, whether the insolvent was entitled to take the benefit of the Act, as he had no *estate*, and the Statute, it was argued, was "for settlement of the *estates* of insolvent debtors, for giving effect to arrangements between them and their creditors, and for the punishment of fraud."

The question came before me lately in an appeal from Belleville, but it happened there was some estate in that case, and no opinion was expressed, although the matter was very fully argued.

There is much to be said in support of each side, but we do not know whether there is an estate or not, and that question was not discussed below, and properly forms no part of the appeal; but it must be remembered this is an insolvent, not a bankrupt law.

Then, it was contended that no one had the right to oppose the granting of the discharge below, because no creditor had filed his claim or proved his debt.

This also is a new question not raised below, and we do not think it necessary to decide it here.

The appeal will be allowed without costs.

Appeal allowed, without costs.

CHADSEY V. RANSON.

Ejectment—Amendment at Nisi Prius—C. S. U. C. ch. 22, s. 222.

Under sec. 222 of C. S. U. C. ch. 22, a Judge at *Nisi Prius* has the same power of amendment in Ejectment as in any other action, and a *Nisi Prius* amendment of a plaintiff's notice of title was, therefore, held to have been properly made.

EJECTMENT.

Plaintiff, in his notice of title, claimed under the will of one William J. Chadsey.

Defendant, besides denying the title of the plaintiff, claimed title in himself by length of possession.

At the trial, amongst other points raised on behalf of the defendant, it was contended that by the devise in the will of William J. Chadsey, no title passed to the plaintiffs; that the land passed by descent and not by devise, and a nonsuit was moved for on this, amongst others ground, which were overruled.

The plaintiff's counsel thereupon moved to amend the notice of title, by making it "as heirs and devisees of William J. Chadsey," it appearing from the evidence that the plaintiffs were his heirs, as well as his devisees under the will, and his surviving children.

The learned Judge gave leave to make the amendment, to which the defendant's counsel objected, contending that the Judge had no power to permit such an amendment.

Leave was thereupon reserved to defendant to move to enter a nonsuit, if the Court should hold that the Judge had no power to make the amendment.

In Easter Term last, *T. H. Spencer* obtained a rule *nisi*, on behalf of the defendant, for a new trial, on the ground of the improper amendment of the notice of title. 1st. Because the Judge had no power to grant the amendment; and 2nd, Because, if the Judge had the power, it was not an amendment that ought under the circumstances to have been made.

C. S. Patterson now shewed cause:—

Sec. 222, of the C. L. P. Act authorised the amendment. In *May v. Footner*, 5 E. & B. 505, a distinction is taken between the effect of the 222nd section of the C. L. P. Act of 1852 in England and similar provisions under sec. 96 of the Act of 1854. There is a recital to the former section as to the power of amendment being insufficient to prevent the failure of justice, by reason of *mistakes* and *objections of form*. This same recital preceded the enacting clause of sec. 291 of our C. L. P. Act of 1856, which was in force in the same form when the cases of *Morgan et al. v. Cook et al.* 18 U. C. 599, and *Coltman v. Brown*, 16 U. C. 133, were decided in this Province. But in the Consolidated Statutes, 22 Vic. cap. 22. sec. 222, this recital is omitted, thereby giving the same extended power to the Judges here as was possessed by the Judges in England, under the Act of 1854, as suggested by Lord Campbell in the case in 5 E. & B. In *Blake v. Done*, 7 H. & N, 465, the Court of Exchequer decided that a Judge at *Nisi Prius* had power in ejectment to amend the proceedings, by adding the names of two additional plaintiffs. The notice of plaintiff's claim of title is in the nature of a pleading and ought to be amendable. Plaintiffs in the notice given claim directly from their ancestors, the only mistake being that they claim as devisees instead of as heirs-at-law. He also referred to *Ritchie v. Vangelder*, 9 Ex, 762; *Ogilvie v. McRory*, 15 C. P. 557; *Harrington v. Fall*, 15 C. P. 543.

Spencer, contra:—The Judge had no power to make the amendment, and ought not to have made it. The 4th and 5th sections of the Ejectment Act, Consolidated Statutes, U.C. cap. 27, enact that the notice of title shall be annexed to the writ and served with it, and shall be limited to one mode of

claiming title, unless by leave of a Judge. If these amendments are admitted a defendant is deprived of the statutory right of knowing sixteen days before he is required to enter his defence what he is called upon to meet. This is like amending a notice of trial or particulars of demand. The notice is not in fact before the Judge at *Nisi Prius*, and is no part of the Record, and therefore not amendable.

RICHARDS, C. J., delivered the judgment of the Court. At one time there was an impression both in England and in this country that many of the sections of the Common Law Procedure Act in reference to amendments did not apply to actions of Ejectment, and this impression may have to some extent influenced the minds of the Judges here in deciding that the notice of claim of title, required under our Ejectment Act, could not be amended at the trial.

The 5th section of the Ejectment Act directs that at the trial the claimant shall be confined to proof of the title set up in the notice, and by section 21 it is provided that the particulars of the claim and defence and of the notices of claimant and defendant of their respective titles, if any, or copies thereof, shall be annexed to the record by the claimants.

By these provisions the notice of claim becomes in effect a part of the record, and if it is wrong it prejudices the plaintiff as effectually as a declaration would, if not properly framed, or framed in or for a wrong cause of action. The 222nd section of our Statute authorises "the Judge at *Nisi Prius* at all times to amend all defects and errors in any proceeding in civil cases * * *, and all such amendments as may be necessary for the purpose of determining in the existing suit the *real question in controversy between the parties shall be so made.*"

Whenever an amendment is made in an existing writ or pleading, whereby such writ or pleading, if bad, is made good, the opposite party may complain, unless the writ or pleading is re-served and such parties allowed to defend or plead *de novo*, that they have not that time which the law

contemplates they should have to answer such writ or plea. That argument would effectually prevent amendments at *Nisi Prius* in pleadings, unless the trial in every case was put off to give the party an opportunity to reply to the amended pleadings. The plain answer to all these arguments is that the Judge, when the application to amend is made, will see that no injustice is done by it, and will impose such terms, on giving leave to amend, as will prevent any hardship to the opposite party. Amongst the recent cases where this line of argument was pursued was *La Banca Nazionale sede de Torino v Hamburger* (2 H. & C. 330), where the plaintiff moved to amend the writ and subsequent proceedings after plea pleaded, by inserting the name of a director of the same branch of plaintiff's Bank as the nominal plaintiff. Defendant's counsel said if the application were granted there would be a new writ, with which defendant had never been served. It was further contended for defendant that the 222nd section of the C. L. P. Act did not apply, and was never intended to extend to such amendments. *Blake v. Done* (7 H. & N.) was referred to. The Court, nevertheless, made the rule absolute on payment of costs.

In *Blake v. Done*, (7 H. & N. 465) the Court allowed a very extensive amendment. It was an action of ejectment by the mortgagee of the devisee against the heir-at-law, in which the question was as to the competency of the testator to make a will. It appeared at the trial that the legal estate was in two trustees, the devisee having an equitable interest only, and it was held the Judge had power under the 222nd section to amend the writ, by adding the names of the two trustees. In giving judgment Pollock, C. B., said, after quoting the language of the 222nd section: "Therefore whenever there is any error in the proceeding with reference to the parties to the suit, or the pleadings, or otherwise, if it becomes necessary to correct the mistake in order to determine the real question in controversy, it is competent for the Court, or any Judge thereof, or the Judge at *Nisi Prius*, to make any alteration for that purpose, and so I think it is competent in an action of ejectment, as well as in

any other action, to make every alteration which may be necessary to try the matter in dispute between the real litigant parties, always providing that no person shall be taken by surprise, and that what is done shall be really and substantially in furtherance of the right and justice of the case."

Wilde, Baron said: "The Legislature has given a general power of amendment for the purpose of advancing justice, and I am glad that in construing the enactment, a broad and liberal interpretation has been put upon it."

Bramwell, Baron, said: "I cannot help thinking that when that section is read, it will be seen that the intention of the Legislature was (*as I know as a fact it was the intention of those who prepared the clause*), that whatever general power of amendment had not been before given, either by reason of the necessity of requiring some particular terms or conditions of the amendment, or through omission, by inadvertence, or otherwise, should be given by the 222nd section. It is impossible to read that section without seeing that no terms could be larger than those used. . . . The general purpose of the 222nd section was that the parties should be enabled to try the real question in dispute. . . . As to the argument that a defendant goes down to try whether the plaintiff on the record has a title, that would be an argument against any kind of amendment, for it might always be said that a defendant goes down to try whether the precise statement made by the plaintiff is true in fact. That, however, is not so: a defendant goes down to try the real question in dispute. Here the defendant went down to try, not whether the mortgagee or the trustees had the legal estate, but whether the deviser was competent to make a will."

So, in the case before us, the defendant went down to try whether the plaintiffs were the owners of the legal estate in the land claimed, not whether they owned it as devisees or heirs at law. It was a matter of indifference to the defendant *how* they owned it, for the real point in controversy was whether they owned it at all or not.

Amending the notice of claim is surely not exercising a

larger power in amending "a defect or error in a proceeding, than making parties plaintiffs in the suit, whose names had not been previously mentioned in the proceedings.

I have made extracts at some length from the judgments of the Judges in *Blake v. Done*, because as some of those Judges had intimate personal knowledge of the views and intentions of the framers of the Common Law Procedure Act, their opinions will be entitled to greater weight in arriving at a conclusion as to the course we ought to pursue, than if they had not possessed such knowledge. I doubt if the learned Judges who decided the case of *Morgan v. Cook*, would have refused to permit an amendment in the notice of title, such as was granted in this case, after reading the opinions expressed in *Blake v. Done*.

I see no practical advantage in holding that we may not amend the notice of claim during the trial in an action of ejectment, when we are constantly making amendments in declarations and other pleadings at *Nisi Prius* affecting the interests of parties to as great an extent as those whose interests are likely to be affected by amendments in ejectment suits. The whole of the proceedings, copy of the writ, appearance, notice limiting defence and notices of title, all being placed before the Judge at the trial, are more in the nature of a declaration and pleadings forming a record (and really ought to be so considered) than as separate proceedings, some of which may be amended there, if defective, and some not.

This amendment seems to me to be covered by the very words of the 222nd section, being of "a defect or error in a proceeding (in this) a civil cause," and was "necessary for the purpose of determining in (this) existing suit the real question in controversy between the parties."

It seems to me desirable to have the powers of amendment apply to ejectment suits, as well as others. The tendency of modern Legislation, has been to abolish as much as possible the distinction between these suits and the ordinary actions brought in Courts, and unless we are prevented by express legislation, or some clearly established rule of law or practice,

from assimilating this to other actions in relation to powers of amendment, I think we ought to do so.

We are of opinion this rule should be discharged.

Rule discharged.

REGINA V. MACDONALD.

Criminal Law—Indictment for perjury—Sufficiency of.

An indictment for perjury charged that it was committed on the trial of an indictment against A. B. at the Court of Quarter Sessions for the County of B., on the 11th of June, 1867, *on a charge of larceny*: *Held*, sufficient, and that it was not necessary to specify the property stolen, the ownership thereof, or the locality from which it was taken; nor to allege that the indictment was in the name of the Queen, as the Court must take judicial notice of the fact that Her Majesty alone could prosecute on a charge of larceny.

This was a case reserved for the opinion of this Court by the Chief Justice of the Court of Queen's Bench, before whom the trial took place at the last Autumn Assizes for the county of Brant.

The facts of the case and the points reserved sufficiently appear from the judgment of the Court.

M. C. Cameron, Q.C., for the Crown:—

The indictment is as certain and full as the form for perjury given in the Consolidated Statutes of Canada, ch. 99, sec. 51.

The objection, if available at any time, should, under sec. 46 of the same Statute, have been "taken by demurrer, or motion to quash the indictment, before the jury were sworn, and not afterwards," in which case an amendment if necessary might have been made. See also sec. 85.

R. Martin, contra:

Section 46 will cure matters of form, but this is a defect in substance. This indictment does not, in addition to the objection taken, state whether the Queen, or who else, was

the prosecutor on the charge of larceny: *Rex v. Lincoln*, R. & R. 421; *Stedman's Case*, Cro. Eliz. 137.

Cameron, in reply:—

The Consolidated Statute, ch. 92, secs. 19–20, speaks of *larceny* as of a well known species of offence and crime, and as not requiring any definition.

A. WILSON, J., delivered the judgment of the Court.

The question is, whether this indictment for perjury sufficiently describes the cause and proceeding in which the perjury is said to have been committed, by stating that it took place at the trial of an indictment found against certain persons [naming them] at the Court of Quarter Sessions for the county of Brant, on the 11th of June, 1867, *on a charge of larceny*, without shewing what the property was which was stolen, and whose it was, and where it was stolen.

Sec. 39 of ch. 99 enacts that “in any indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court, or before whom the oath, &c., was taken, &c., without setting forth the bill, answer, information, &c., or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed.”

This enactment has been in force since the 23 Geo. II., ch. 11.

In *The King v. Dowlin* (5 T. R. 311) it was said that the allegation, “that at a certain Court of Oyer and Terminer, K. was in due form of law tried, upon a certain indictment for the murder of A., by a certain jury of the county duly taken and sworn, and that upon the said trial, in open Court at the said Sessions, the defendant appeared as a witness, took his corporal oath, &c., and swore, &c.,” would be an allegation of the substance of the offence.

Here it was stated that K. was tried not only for the offence of murder, but for the murder of A.

By the 41st section of the Act, it is sufficient in the indictment for any felony, after a previous conviction of

felony, to state that the offender was at a certain time and place convicted of felony, *without otherwise describing the previous felony*.

In the form of indictment for perjury given by the Statute the substance of the offence is thus stated, that at such a time and place before, &c., "a certain issue between one E. F. and one G. H. in a certain action of covenant was tried, upon which trial A. B. appeared as a witness, &c."

Here, then, is the fact that there was a certain issue; secondly, that it was between E. F. and G. H.; and thirdly, that it was in an action of covenant. It does not shew which of the parties was plaintiff or defendant, nor what the issue was, nor whose covenant it was, nor what the covenant was about.

In the case reserved it appears

1. That a bill of indictment was at a certain time and place and before a certain Court found.

2. That it was found against certain persons, and

3. That it was on a charge of larceny.

It was said that it did not even appear upon whose prosecution the indictment was found or tried; but I think we must take notice that Her Majesty is the only person in whose name the prosecution can be carried on in cases of larceny. We should, certainly, be bound to notice that the Crown could pardon for such an offence, and the power and right to pardon are the incidents to and the result of being the party prosecuting.

It appears to me, therefore, that this indictment states sufficiently the prosecutor and the parties charged in that indictment, and the substance of the charge, that it was *for larceny*, and that it was not necessary it should have set forth the goods taken, or whose goods they were, or what goods they were, or where they were taken. It is more specific than the statement which is made of a previous conviction of felony, for here the particular kind of felony, namely, larceny, is mentioned. There might happen to have been different counts, stating the articles to have been the goods of different persons, in order to insure a

conviction, and there might in fact have been three different takings, but all happening within six months, and if any part of the goods should be mentioned, then all must be mentioned; and if the person, whose goods they were, must be mentioned, then all the counts of the indictment must be set out, when the ownership of the goods is stated differently in different counts.

The question is not whether a particular person was charged with stealing a horse, or an ox, or an ass, but whether that person was charged at a particular time and place with the offence of larceny, and whether upon that occasion the defendant committed perjury or not.

For obtaining money or goods under false pretences the indictment must state whose the money was or goods were: *Reg. v. Norton* (8 C. & P. 196); *Reg. v. Martin* (8 A. & E. 481); but in reciting such a prosecution, upon which to found a charge for perjury, it does not seem to me that the same particularity would be necessary—otherwise, the false pretence should be set out too, and it was only after a long course to the contrary that it was at length determined the false pretences should be set out in the indictment for the specific offence: *Rex v. Mason* (2 T. R. 581).

In an indictment for conspiracy to obtain money by false pretences it is not necessary to set out the pretences, as the gist of the offence is the conspiracy: *The King v. Gill et al.* (2 B. & A. 204). In this last case it was necessary to state who the persons were whose money was so to be obtained, for the offence was in conspiring to cheat them, which would distinguish it from the present case in this respect.

The substance of the offence charged means, according to the case of *Rex v. Horne* (Cowp. 682), that “the charge must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer: that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them; and that the Court may see such a definite crime that they may apply the punishment which the law prescribes;” and I think it is in this case sufficiently stated.

We affirm the conviction and order that judgment be pronounced thereon upon the defendant at the next Court of Oyer and Terminer and General Gaol Delivery for the County of Brant.

Judgment accordingly.

KELLINGTON V. HERRING ET AL.

Sealed instrument—Estate conferred—Trespass quare clausum fregit—Right to maintain.

By an instrument under seal between plaintiff and defendant H., H. agreed to allow plaintiff the use of his grist and saw mills for five years, on condition that each party should pay half the repairs upon the mills for the term named; the saw mill and books to be under the *control* of H., and the grist mill chiefly under the *control* of plaintiff. The agreement then stated that H. allowed plaintiff the use of a dwelling-house and barn near the mill, &c.; and each party was to pay half the taxes "*on the property above named during the term of five years*": *Held*, that plaintiff took a legal estate under the instrument in the whole of the property for the period of five years, subject to the rights to be exercised over it by H., as well as to the other conditions of the agreement, and that plaintiff could therefore maintain trespass against two others of the defendants who entered under H. and expelled plaintiff from the dwelling-house.

Trespass for breaking and entering a dwelling-house of the plaintiff and converting his goods.

Blair, one of the defendants, allowed judgment to go by default.

The other defendants pleaded

1st. Not guilty.

2nd. The dwelling-house not the plaintiff's.

3rd. Leave and license.

Issue.

The cause was tried at the Assizes held for the United Counties of York and Peel in January, 1867, before Morrison, J.

The jury acquitted the defendants Herring, McQuarrie, and McLeod, and found a verdict against Dodds for \$500 damages, and assessed damages against Blair at \$100.

The defendants' counsel contended that the plaintiff's title to the property under the agreement put in, dated the

1st of April, 1864, continued no longer than while he worked the mill adjoining the dwelling-house, and that defendant Herring was a partner of plaintiff as to the working of the mill and the occupancy of the dwelling-house; and he further objected to the charge of the learned Judge, because he did not define to the jury the nature of plaintiff's holding under the agreement, contending that plaintiff had no term, and that the moment he ceased to work the mill his term was at an end, and that as plaintiff was personally out of possession of the house trespass would not lie.

The agreement was between Herring and plaintiff, and was under seal, and under it Herring agreed to allow plaintiff the use of his grist mill and saw mill for the space of five years from the date thereof, on the conditions stated in the head-note and judgment.

In Hilary Term last *M. C. Cameron*, Q.C., on behalf of Dodds and Blair, obtained a rule *nisi* on the plaintiff and on the other defendants to set aside the verdict, and for a new trial, on the law and evidence, and for misdirection in telling the jury that plaintiff was entitled to an estate or term in the land in question, and in not telling them that under the agreement put in plaintiff had no title to the premises, after leaving the same without intending to return.

Doyle now shewed cause:—

The two defendants, against whom damages were given, were mere wrong-doers, and plaintiff's actual possession, which was clearly proved, was quite sufficient as against them to sustain the claim to the damages which were awarded. But the agreement conferred upon the plaintiff an actual term or title in law to maintain the possession against all persons.

McMichael, for Herring, McQuarrie, and McLeod, opposed the rule being made absolute so far as they were concerned, as the verdict now stood in their favor.

Cameron supported the rule for *Dodds* and *Blair* :—

Herring was the owner of the property, and the evidence shewed that he had demised to *Dodds* : it was not necessary to produce the written instrument, if there was one : the fact of demise was sufficiently proved by mere parol.

By the agreement Herring and plaintiff were partners for five years to carry on the mills, and whenever plaintiff left the premises permanently, Herring, as the owner, had the right to enter for condition broken. The agreement did not deprive Herring of the right to enter for default : it was a condition, for breach of which Herring, as owner, might enter, on the plaintiff ceasing to work the mill : *Benham v. Gray*, 5 C. B. 138 ; *Doe dem. Colnaghi v. Bluck*, 8 C. & P. 464 ; *Cole* on Ejectment, 402 ; *Doe dem. Henniker v. Watt*, 8 B. & C. 308 ; *Woodfall*, L. & T. 9th ed. (by *Cole*) 576, 7.

The verdict may stand in favor of the other three defendants, and a new trial be granted only as to the other two : *Cleland v. Robinson et al.*, 11 C. P. 416.

A. WILSON, J., delivered the judgment of the Court.

As under the plea of the dwelling-house not being the property of the plaintiff the defendants can shew that the title was in some third person under whom they acted, it will be necessary to determine whether the evidence shewed that *Dodds* and *Blair* acted under any such authority, assuming for the present that the title was in a third person, leaving in the plaintiff only the right or title which possession conferred. If it did, the further question will be whether the title was proved to have been in any other person than the plaintiff.

But if *Dodds* and *Blair* did not act by the command of the person having title, but were mere wrong-doers, the consideration of any higher title than possession will not be required.

I do not inquire into the plaintiff's possession, for the evidence shewed a quite strong enough possessory interest to support his suit against any one not having or not acting under title.

The evidence, I think, warrants the conclusion that Dodds was not a mere wrong-doer, but was acting under the authority and title of Herring, the owner; but it is strange the jury should have convicted Dodds and acquitted Herring.

Here the inquiry is whether the plaintiff had a better right to the possession than Herring, and that depends upon the meaning and effect of the agreement before mentioned. The language of it is, that Herring "agrees to allow the plaintiff the use of his grist mill and saw mill for the space of five years from the date hereof, on the following conditions, &c." It then provides that each party shall pay half the repairs upon the mills "for the term above named;" that "the saw mill and books shall be under the control of Herring, and the grist mill shall be chiefly under the control of the plaintiff."

Then Herring "allows the plaintiff the use of a dwelling house and barn, &c.;" "and each party shall bear half the expenses of all taxes on the property above named during the term of five years, except road tax, &c."

If the owner had not been the person who was to participate in the profits and in the working expenses, and in the control of the property, the fair construction of the instrument would have been that it was a lease.

There are sufficient words of demise in it even as against the owner; but the question is whether that would be the just interpretation to put upon it; for "the rule to be collected from all the cases is, that the intention of the parties as declared by the words of the instrument must govern the construction:" *Poole v. Bently* (12 East. 168.)

Does it appear here that the owner parted or intended to part with the exclusive possession of the property, or to confer only such a right of occupancy and user on the plaintiff, in common with the owner, for the purpose of carrying on in it the partnership business of millers?

If the agreement had been that the plaintiff should have the issues and profits of the mills, which would have been just the same as his having the mills themselves, he would have been a lessee: *Parker v. Plummer* (Cro. Eliz. 190);

but he is only to have half the profits, that is, he is to share them with the owner of the property.

To constitute a lease proper, it is only necessary it should be the intent of the parties that one should divest himself of the possession, and the other come into it for some determinable time: *Bac. Abr. (Leases,)* K. Here there has been no divesting of the possession by Herring.

No doubt the partnership might have been carried on by the legal estate in the property remaining in Herring, or it might have been arranged that the legal estate in it for the five years should be transferred to the plaintiff, with express permission to Herring to use the premises as a partner should during that time.

Can there be any legal interest conferred on another, to enjoy in common with the owner, while the owner retains a legal estate or interest himself?

The case of partners referred to in the argument shews this may be so: one partner may have the legal term for years and he may sublet to the partnership.

A man could not demise to himself and another: the demise to himself would probably be void: *Harker v. Birkbeck* (3 Burr. 1563, & note), *Francis v. Doe dem. Harvey* (4 M. & W. 331): he could not be his own tenant. But there can be no reason why a householder for years might not give another a valid right of occupation of the house along with himself for a particular time; the effect of which would be that the grantee would be a tenant in common with the grantor: *Rodgers, App. v. Harvey, Resp.* (5 C. B. N. S. 3, and the two cases there cited, on which the judgment was given.) I have had some difficulty in forming an opinion upon the legal effect of the instrument, and according to the best opinion I can form, I think it conferred a legal estate upon the plaintiff in the property contained in it for the period of five years from its date, subject to the rights to be exercised over it by Herring, and subject to the other conditions of the agreement; and it is of no consequence, so far as these defendants are concerned, whether that interest was in common with, or as under-tenant of, Herring,

for in either case the plaintiff could sustain an action against Herring himself for an actual expulsion, which was proved here.

The same legal estate which was granted in respect of the mills, was granted also, I think, in respect of the house, upon which the trespass was committed, although the language as to it is not so direct as that which relates to the mills.

As to the house, the agreement is that "Herring allows the plaintiff the use of a dwelling-house, &c.," without stating any express period or term; but it continues, "each party shall bear half the expenses of all taxes and assessments made *on the property above named during the term of five years*, except the road tax, &c.;" and, taking the whole agreement together, it appears to be the proper construction to place upon it that, as the plaintiff had the mills for the period of five years, he had the dwelling also for the like term.

The rule I think should be discharged.

Rule discharged.

DOYLE V. ECCLES.

Trover—Solicitor's docket—Excessive damages—Form of rule absolute.

In trover, for the conversion of a solicitor's docket and papers, containing entries and evidences of certain bills of costs against different parties, the jury gave a verdict for \$2500. On motion to set this verdict aside as excessive, the Court made a rule that upon defendant delivering up to plaintiff the book and papers in question, if the plaintiff chose to accept them, the verdict should be reduced to one shilling, and defendant pay the costs of all proceedings, to be taxed on the Superior Court scale, a certificate for which to be granted by the Judge who tried the cause, if necessary; but that if plaintiff should prefer proceeding with the action, then he should proceed merely for such special damage as he might claim to have sustained, with liberty to amend his declaration accordingly, and to proceed at the risk of all costs.

In such an action the measure of damage is not the value of the book as a mere book, but what it is worth to the plaintiff irrespective of such value.

TROVER for the conversion of a Chancery docket, books, papers, &c., with a claim for \$2000 damages.

Pleas—Not guilty, and a denial that the property was plaintiffs.

Issue.

The cause was tried at the last Spring Assizes for the County of York, before Morrison, J.

It appeared in evidence that plaintiff and one Henry Eccles (defendant's father), deceased, had been partners, as Solicitors in Chancery, and that the docket in question contained entries in about one hundred suits, plaintiff's share in which amounted to some £500 or £600, had been handed over to plaintiff, on the dissolution of the partnership, to wind up the business.

It further appeared that defendant, who seemed to have acted as agent for his mother, the administratrix of his father's estate, borrowed this docket from the plaintiff, in order, as he alleged, to look it over with a view to the settlement of plaintiff's claim against the estate, and under a promise to return it on the following day. Defendant, however, never returned the book, though a demand was made upon him for it; and it was proved to be impossible for the plaintiff, without it, to collect the costs contained in it, or to make out his accounts against the estate.

The learned Judge directed the jury, if they thought the plaintiff entitled to the possession of the book and papers, to give such damages for their detention as they were worth to the plaintiff, and they gave \$2500.

In Easter Term last, *M. C. Cameron*, Q. C., obtained a rule to set aside the verdict, on the law and evidence, for excessive damages, and for misdirection, in telling the jury that the plaintiff was entitled to recover any sum they thought the book was worth to him, irrespective of its value as a mere account book, and in not telling the jury that the defendant, who was acting as the agent of his father's estate, was entitled to the book, if his father was the owner of it; or why all further proceedings in the cause should not be stayed, on the defendant delivering to the plaintiff the book and papers, the subject of the action, on payment of costs.

Read, Q.C., now shewed cause :—The plaintiff was rightly entitled to the full amount of damages (\$2,000) laid in his declaration, according to the evidence: the \$500, in excess of this, he may remit. It was properly found by the jury that the book was in the lawful possession of the plaintiff, and was given to the defendant upon his personal undertaking to return it, which he failed to perform: *Reynolds v. Waddell*, 12 U. C. 9; *Phillips v. Jones*, 15 Q. B. 859; *Bac. Abr.* “Detinue” A. B.; *Addison on Torts*, 387; *Peters v. Heywood*, Cro. Jac. 682; *Loosemore v. Bradford*, 9 M. & W. 657–9.

The defendant should not now be relieved from the damages, upon giving up the book and papers, without shewing he had some reasonable pretext for detaining them, especially after having kept it so long.

James Patterson, on the same side, cited *Gowland v. Meade*, 6 C. P. 353; *Armory v. Delamirie*, Str. 505; *Coombe v. Sanson*, 1 D. & R. 201.

M. C. Cameron, contra :—

The book was the property of Eccles before the plaintiff entered into partnership with him, and the subsequent entries in the book by the plaintiff did not make it the property of the firm, and certainly not his.

The large damages given for the detention of title deeds will not sustain the excessive verdict in this case.

The docket, it is said, was useful to the plaintiff to enable him to make out his account for costs due to him; but he had done that already, or he could have done it by other means, for he had bills of costs at the trial in the suits, which he said were contained in the docket. There was no evidence that the plaintiff had sustained or could sustain any thing like the damages he has recovered: all, or most of the claims on the docket were old and were barred by the Statute.

The plaintiff was only possessed, in common with the representative of Eccles, of the book, and as the defendant was acting as the agent of his father's estate when he got the book, trover cannot be maintained against him: *Morgan v. Marquis*, 9 Exch. 145; *Edwards v. Hooper*, 11 M. & W.

363; *Reid v. Fairbanks*, *Ib.* 192, 729; *Matthew v. Sherwell*, 2 Taunt. 439; *Brierly v. Kendall*, 17 Q. B. 937; *Wills v. Wells*, 8 Taunt. 264; although it may be that assumpsit might lie against the defendant upon his express undertaking, as proved.

The cases referred to shew also that the damages are excessive, and should have been restricted to the value of the book as a mere account book, which was about \$1.50. Relief at any rate should be given by reducing the damages, on the giving up of the book and papers.

A. WILSON, J., delivered the judgment of the Court.

The jury must have found that the defendant was not representing his father's estate when he got the book, though as the only child of his parents, and the person chiefly interested in that estate, there was much to shew that he did act and was recognised by the plaintiff as acting on behalf of his mother, the administratrix, in the transaction.

So the jury must have found that this docket and papers were the absolute and sole property of the plaintiff, and that it was not his only in common with the representative of his former partner, even although the defendant did what he is charged to have done, as the agent of the estate.

There is much evidence against their finding in this respect, and that it was more in favor of the defendant than of the plaintiff.

It is said the defendant may be liable to be sued in assumpsit for the breach of his promise to return the book. If the question then is to be reduced to whether the defendant shall be sued in assumpsit or in trover, and if we cannot relieve the defendant on any other terms than on payment of costs, we need not trouble ourselves very much by determining in what form of action the rights of the party can be best determined, so long as we think they can properly be determined on the present motion.

We see no note of any objection taken for misdirection, and we do not think the ground stated as misdirection in the rule was a misdirection. The plaintiff was entitled to

recover, if at all, for such sum as the jury thought the book was worth to the plaintiff, irrespective of its value as a mere account book, if they believed it was the plaintiff's own book, or that the defendant was a mere wrongdoer, and was not acting as the agent of his father's estate, and that there were accounts contained in it of the value spoken of, which the plaintiff could not collect for the want of it: *Anderson v. Passmore* (7 C. & P. 193), and the cases which apply to the title deeds. And we see no note either of any non-direction having been objected to; but whether objected to or not, we think the learned Judge did in effect leave it to the jury to say whether the book was the property of the plaintiff alone or not.

If the question were simply whether the verdict should stand or a new trial be granted, we should be obliged to say that the cause must be tried again, because, on the whole, it appears to be against evidence on the two points of sole property being in the plaintiff, and of the defendant not having acted as agent for the estate with respect to the getting of the book.

But while we think this, we see also from the evidence that the plaintiff was wrongly deprived of the book and papers by the defendant, and that the plaintiff, because he can more profitably use the book than the administratrix, is rather more entitled to it than she is, and should have it restored to him.

The damages awarded seem to be the full value of the plaintiff's share of debts contained in the docket. The statement shewing such share was made out many years ago by the late Henry Eccles, and either the debts had not been collected between that time and the time when the defendant got the book, or they had been collected in whole or in part. If they were not collected, it may either have been by the delay of the plaintiff, or because they could not be collected. In either case the share should scarcely have been valued at its full nominal amount by the jury; and if the debts, or any of them, had been collected, the verdict should by that sum have been so much less than it now is.

It would not be satisfactory to let the verdict stand for so large a sum as \$2000, and it would not be quite right towards the plaintiff to grant a new trial for the purpose of defeating him on questions which we think can be fairly arranged now; and it is not unjust towards the defendant, who has brought about all this difficulty, to make the ordinary rule in cases of this kind, that upon the defendant delivering up to the plaintiff the book and papers in dispute, if the plaintiff shall choose to accept the same, the verdict shall be reduced to one shilling damages, and that the defendant shall pay the costs of all proceedings, to be taxed by the Master on the scale of Superior Court costs, and if necessary, that a certificate of costs, with the defendant's consent, shall be given by the learned Judge who tried the cause; but if the plaintiff shall choose to proceed with this action, then he shall proceed only for such special damage which he may claim to have sustained, and he may amend his declaration stating such special damage accordingly; but if he shall so proceed, it shall be at the risk of all costs.

This is stated to be the course of proceeding in Arch. Prac., 11th Ed. 1867, and it is the course followed as late as in *Lyons v. Keller* (15 Ir. C. L. Rep., App. 1.) The substance of the rule is given in *Lucas v. The London Dock Co.* (4 B. & Ad. 380.)

The plaintiff has stated no special damage in his present declaration: he was not required to do so as the matter stood, because the full value of the debts would have been his entire compensation; but now that he cannot proceed further on this ground, he may perhaps wish to lay some special claim for damages by reason of the detention; as, that certain of the accounts could not in the meantime be collected, and have since been refused payment, in consequence of the Statute of Limitations having been set up, or any other special cause of damage, if any such can be assigned; and for this purpose the plaintiff should be allowed to amend his present count in this respect, or to add another applicable to the new state of things.

We could not have granted a new trial to the defendant,

excepting on the payment of costs, and the course we now adopt in making absolute the last branch of the defendant's rule, will, in our opinion, more effectually serve the interests of all parties.

If, however, the plaintiff do not elect to accept the payment of costs and to stay the proceedings, but desires to prosecute the action for the recovery of special damage, it will be on the usual terms, at the risk of all costs, as before mentioned.

Rule absolute in the terms stated in the judgment.

KOSTER v. HOLDEN.

Circuity of action—Pleading.

It is not necessary to plead a special plea of circuity of action: whenever this appears by the record it is an answer to the action.

In this case the declaration stated that plaintiff agreed to sell, and defendant agreed to buy from plaintiff certain land, which was at the time encumbered, \$1000 of the purchase money to be paid down for the purpose of paying off the encumbrances, under a penalty of \$300 to either, to be paid on 19th September following, in case he did not carry out the bargain. Plaintiff then averred his willingness, readiness and ability to complete the sale, and on payment of the \$1000, to pay off the encumbrances and make a good title to defendant, and also his execution of a deed to defendant before said 19th September, ready to be delivered to defendant on his paying the \$1000, to be applied as aforesaid, &c.; yet defendant did not accept the conveyance or pay the \$1000, and plaintiff claimed the \$300 as liquidated damages.

Defendant pleaded that plaintiff had not at the time of the alleged breach, or at any time before the commencement of this suit, a good title to the land, and was not able to convey the same as agreed, and the issue joined on this plea was found for defendant:

Held, that as plaintiff had not begun his suit till after the time for payment of the money by defendant, and had not title, it thus appeared he was as much in default at the commencement of the suit as defendant, and as the damages would be the same against both parties, the defence was a good answer, in avoidance of circuity of action, and a rule to enter judgment for plaintiff *non obstante veredicto* was therefore discharged.

This case had been before the Court on two different occasions, as reported in 16 C. P. 332, and 17 C. P. 139.

It was tried again at the last Winter Assizes for the County of York, before *Hagarty*, J., when a verdict was found for the plaintiff on the first issue, with \$300 damages,

and a verdict for the defendant on the third issue, according to the note on the record, but according to the plaintiff's rule, on the second and third issues.

In Hilary Term last *Robert A. Harrison* obtained a rule calling on the defendant to shew cause why the judgment should not be entered for the plaintiff on the issues joined on the second and third pleas of the defendant, so far as they related to the second count of the declaration, or on one or other of them, so far as it related to the second count, notwithstanding the verdict found for the defendant thereon, upon the ground that the issues were immaterial; or why, if necessary, a repleader should not be awarded; or why the said pleas, or one or the other of them, and the issues joined thereon, should not be struck out or limited to the second count; or why the verdict entered for the defendant on the said issues, or one of them, should not be set aside and entered for the plaintiff, on ground of mis-direction by the learned Judge in directing a verdict to be entered thereon for the defendant.

M. C. Cameron, Q.C., and *McMichael*, shewed cause:—

The second and third pleas are not immaterial.

It is not necessary to plead circuity of action, if the facts stated on the record show that such a state of things exists, or that there is such a ground of defence: there is properly no plea of circuity of action: *Bishop v. Hayward*, 4 T. R. 470; *Wilders v. Stevens*, 15 M. & W. 208; *Walmesly v. Cooper*, 11 A. & E. 222; and the second and third pleas, being found for the defendant, do now shew such a state of things on the record as disentitles the plaintiff to a verdict on the first issue, because, according to the judgment of the Court, if the plaintiff be entitled to recover the \$300 damages on that issue, the defendant must, according to the finding of the other issues, be entitled to recover the like sum of money back again, by reason of the plaintiff's failure to perform the same agreement.

Harrison, contra:—When the nonsuit in this case was

set aside and a new trial granted, it was upon the ground that the plaintiff was entitled to recover damages on the first count upon the pleadings as they stood, and that even if he failed upon the second and third issues, it was of no consequence to his right of recovery.

The second and third pleas were therefore considered by the Court as immaterial, and the plaintiff should therefore get judgment *non obstante*: *Gwynne v. Burnell*, 6 B. N. C. 453; *Pim v. Grazebrook*, 2 C. B. 429; *Lambert v. Taylor*, 4 B. & C. 138; *Fillicul v. Armstrong*, 7 A. & E. 557.

A. WILSON, J., delivered the judgment of the Court.

There is no necessity to plead a plea of circuity of action: whenever this appears on the record it is an answer to the action: it was upon this ground we gave judgment for the defendant on demurrer to the first count.

In setting aside the nonsuit I said, in giving the judgment of the Court: "As to the second count, I am not satisfied the plaintiff properly failed upon the first issue. Upon the second and third issues, I think, he did fail, for he was not ready and willing in the legal acceptation to make a conveyance. If the plaintiff is entitled to a verdict on the first issue he must be entitled to the \$300 damages as a consequence, because the defendant's breach, by non-payment of the \$1000, is not at all affected by the plaintiff's subsequent inability to convey the land, and because there is no defence upon the record of circuity of action, or otherwise, to prevent a recovery by the plaintiff."

I should not, perhaps, have spoken so generally of the second issue, "for although the plaintiff was not ready and willing to carry out his agreement," that is not the substance of the issue: the plea is, "the defendant was always ready and willing and offered to perform the said agreement on his part, but the plaintiff was not ready and willing to carry out the agreement on his part", and the substance of it is that "the defendant was ready and willing and offered to perform the agreement on his part"; but this he certainly

at once and before the plaintiff was required to do anything whatever ; and he altogether failed to prove, or rather he never attempted to prove any such readiness and willingness or offer to pay. This issue was not then and is not now proved.

It was not necessary on the former occasion to refer very precisely to the pleas and to distinguish between the second and third, because we were merely deciding whether the plaintiff had been properly nonsuited or not, and in using the general language, "upon the second and third issues, I think, the plaintiff did fail, for he was not ready in the legal acceptance to make a conveyance," I was expressing, not the precise meaning of the second plea singly, but the general effect of the two pleas together, the third plea being "that the plaintiff had not at the time of the alleged breach, or at any time before the commencement of this suit, a good title to the land and premises, and was not able to convey the same according to the agreement"; so that it substantially covers the general language which was used, when greater precision of expression was not absolutely required.

The second issue was not in my opinion proved, as I have stated, and it should not have been found for the defendant, and, as it happens, it was not in fact found for him, according to the entry on the record.

Then, as to the third issue, it appeared to us before and it appears to us still, that the plaintiff would be entitled to recover on the count on which this issue is raised, as proved, upon shewing merely the defendant's default, without shewing that the sum of \$1000 was to have been paid down for the special purpose of enabling the plaintiff to pay off the mortgages against the land ; and if this be the whole effect of the count, the defendant's recovery on the third issue will be an answer to it, because it will shew facts which would entitle the defendant to recover just the same money back again from the plaintiff.

The third count, I think, could have been supported by shewing the special cause or reason for the sum of \$1000 being required down, and the like answer of circuity of action could not have been made ; for the defendant cannot be allowed, firstly, to create the plaintiff's default, and then to

defeat his recovery because he had created it. If the plaintiff were to have received the \$1000 to enable him to perfect his title by the time named, it would have been no answer that he had not a good title before the money was paid which was to enable him to make a good title. In such a case the plaintiff would have recovered the \$300 liquidated damages, and the defendant would have had no cause of action whatever against the plaintiff.

But the agreement does not contain such a provision, and I do not think that it can be implied or be proved by parol and made a part of it: *Goss v. Lord Nugent* (5 B. & Ad. 58); *Stead v. Dawber* (10 A. & E. 57.); *Marshall v. Lynn* (6 N. & W. 109); *Bradley v. Oastler* (11 Jur. N. S. 22.)

As the third issue in our opinion offers a good defence to the count the rule will be discharged.

Rule discharged.

REGINA V. MILLS ET AL.

Public highway—Right of Crown to grant—Liability of patentees and their grantees for non-repair.

Grantees of the Crown, of public highways, are indictable at the suit of the public for default in repairing such highways, although they are also liable to the Crown for the breach of their covenant to that effect contained in the patent; and this liability follows and accompanies the transfer of the property, so as to make the purchaser of part and mortgagee of the residue also indictable for the same cause, although it has been expressly agreed between grantor and grantee that the former shall and the latter shall not be bound to repair.

Semble, that an agreement by the Crown that the grantee should not be liable to repair, could not, with the grant of the tolls, have relieved them from the public duty of necessary repairs.

The patent, in this case, granted a certain public toll-bridge with a planked and macadamized toll-road, together with all toll-gates on said road or bridge, "and now vested in us, and the tolls arising from said bridge and road, on certain conditions contained, &c.": *Held*, that the patent was not *ultra vires*, but passed the soil and freehold and the right and franchise of taking tolls thereon and in respect thereof; and that the road was not at the time when, &c., a Government work, to be repaired by Government, but by defendants.

Held, also, that to maintain the indictment against defendants, it was not necessary that the Government Engineer should first have condemned the road by certificate.

Case reserved by the Court of Quarter Sessions of the County of Haldimand, under the Statute.

The defendants were indicted for a nuisance, by reason of the public highway, called the Hamilton and Port Dover Plank Road, leading from the City of Hamilton, in the County of Wentworth, to the Village of Port Dover, in the County of Norfolk, being out of repair.

The indictment stated this to be a public highway, and that defendants were the lessees of it, and entitled to charge tolls thereon, and liable to keep the same, and of right were bound to repair and amend the same, when and so often as it should become necessary; but that they had neglected to make such repairs, by reason whereof, &c.

Defendants pleaded not guilty.

At the close of the case defendants' counsel objected

1. That it was not shewn there was any duty on the defendants to repair, but the contrary appeared from the evidence of the patent from the Crown and the other conveyances put in, and from the C. S. U. C. c. 49, s. 70, and the C. S. C. c. 28, s. 85.

2. That the patent was *ultra vires* and transferred nothing, and the road was still a Government work, to be repaired by the Government, and not by defendants.

3. That if any duty to repair were, under the facts, cast upon the defendants, or any of them, it arose, or the breach of it was indictable, only upon the Government Engineer granting his certificate, and upon his condemnation of the road, or some particular part of it, which had not been done.

The jury found the defendants guilty; but judgment was postponed until the above questions should be considered and decided by this Court.

The evidence material to the case was as follows:

The patent from the Crown, dated 13th January, 1865, recited, that it had been deemed expedient, as appeared by an order in Council of the 6th of June, 1864, to dispose of the following public works, that is to say, the public toll-bridge situate in the Village of Caledonia, in the County of Haldimand, and known as the "Caledonia Bridge," and the planked and macadamized toll-road, commencing at the City

of Hamilton and running southerly to the Village of Port Dover, in the County of Norfolk, including, &c., being composed of all that part of the public toll-road known as "the Hamilton and Port Dover Road," lying between the City of Hamilton and the south-western extremity of the south-western abutment of the said swing-bridge over the said creek, at the Village of Port Dover aforesaid, together with all bridges on the said road, and all toll-gates, toll-bars and toll-houses on the said road, or on the said Caledonia bridge, and then vested in the Crown, and the tolls arising from the said bridge and road, on certain conditions settled by another order in Council, bearing date the tenth day of August then last passed :

That the grantees proposed on the 1st of September last to purchase the public works above-mentioned for the sum of \$17,000, upon the conditions stated in the said order in Council last before mentioned :

That the Commissioner of Public Works was duly authorized, by an order in Council of the 23rd of November last, to sell and convey the public works above mentioned to the grantees thereafter named, on the terms and conditions thereafter set forth ; and that the grantees, for themselves and their heirs, executors, administrators and assigns, had agreed to accept the grant on the said terms and conditions, signified by their signatures and seals respectively set and affixed to the said presents.

Then followed the grant to Zaccheus Burnham Choate and Samuel Kerr, their heirs, executors, administrators and assigns, according to the quality and nature thereof, of the said "Hamilton and Port Dover Road," and the said "Caledonia Bridge," and all other the bridges, &c., &c., &c., to hold to them and their heirs, executors, administrators and assigns, forever, upon and subject to the terms, provisions and conditions following, that is to say,

1. As to payment of the \$17,000, with interest at 7 per cent.

2. "That the said grantees, their executors, administrators and assigns do and shall keep the said road and bridges

never was prepared to do, for he was bound to pay the \$1000 thereon erected, or which may be hereafter erected or built thereon, and all other the works and premises hereby transferred, at all times hereafter in thorough repair; and that for all the purposes of these presents, the sufficiency of such repair shall be ascertained and decided on by the Engineer or officer appointed by our Commissioner of Public Works in and for our said Province, and his decision and report as to the sufficiency or insufficiency of such repair shall be final and conclusive."

3. Right of entry and of creating a forfeiture, "on breach of either of the preceding conditions."

4. "The said road and bridges shall at all times continue to be public highways, subject only to the payment of the tolls legally imposed thereon."

5. As to certain exemptions from toll.

6. Right to resume after ten years on certain conditions.

7. As to mode of enforcing right of re-entry.

8. "The grantees shall give satisfactory security for the immediate repair or rebuilding of the Caledonia bridge, according to plans approved of by our Commissioner of Public Works."

9, 10, 11, 12, 13—as to tolls.

14. That security be given for payment of the first five instalments of the purchase money.

At the foot of the grant was contained, "And we the said grantees do hereby testify our acceptance of the foregoing grant and conveyance, subject to all and every the terms and conditions therein contained.

Witness our respective hands and seals this 9th of March, 1865.

(Signed)

Z. B. CHOATE,

"

SAMUEL KERR."

Then followed an indenture made the 26th of September, 1866, between Z. B. Choate, Samuel Kerr, and Jacob Terryberry Kerr, of the first part, and the Honorable Samuel Mills, of the second part, reciting the letters patent, and that subsequent to the granting of the same Z. B.

Choate and Samuel Kerr had granted and assigned one undivided third part of and in said premises therein described to Jacob Terryberry Kerr, and that parties of first part had contracted with party of second part for the absolute sale to him of ten miles of said Hamilton and Port Dover Road, commencing at the southerly limit of City of Hamilton and extending southward along said road the distance of ten miles, together with all toll gates; and had agreed to keep same and remaining portion of said road and Caledonia bridge, in good repair, for balance then due Government, not exceeding \$17,000; that party of second part should at any time within three years have option of purchasing remainder of road and Caledonia bridge for additional sum of \$17,000; and that until party of second part elected to purchase remainder of road and bridge, and in event of his not so electing to purchase, parties of first part were to keep said bridge and road, as well ten miles sold to party of second part as remainder thereof, in good repair during time bridge and road should continue to be held from Government under terms of letters patent, and for due and faithful performance of agreement on part of party of first part, they had agreed to grant and mortgage to party of second part said bridge and remaining portion of said road.

Then parties of first part granted to party of second part aforesaid ten miles of road, together with all toll-gates and toll-houses thereon, and emoluments arising therefrom, and all other rights and privileges thereunto in any way appertaining, to have and to hold to party of second part, his heirs, executors, administrators and assigns, to his and their sole and only use forever, subject to terms of letters patent.

Covenants by parties of first part :

1. That party of second part should, within three years, have right of purchasing remainder of road and bridge on terms therein mentioned.

2. That until party of second part should elect to buy, and in event of his not electing to buy, remainder of

road and bridge, parties of first part should at all times, while road and bridge continued to be held from Government under letters patent, keep whole of road, as well ten miles thereof sold and conveyed to party of second part as remainder thereof, and bridge and all other bridges, &c., &c., in good and sufficient repair, and would in all respects perform all conditions contained in letters patent [except as to payment of purchase money,] and keep party of second part indemnified against all actions, &c., &c. &c., which might be incurred or sustained by reason of non-observance of said conditions, &c., in letters patent contained, excepting payment of purchase money.

3. If parties of first part should not keep bridge and whole of road in repair to satisfaction of Government Engineer, referred to in letters patent, and to satisfaction of County Engineers of different counties through which road passed, and should not keep all conditions in letters patent, then, upon bridge and road, or either of them, or any part of road, being pronounced in bad repair by Government Engineer, or by any or either of County Engineers, above mentioned, or upon their failure to keep said conditions, or any of them, party of second part, his heirs, executors, administrators and assigns, should have full power and authority into and upon bridge and remaining part of road to enter, and to obtain possession thereof by law, or otherwise, and to receive and take tolls and emoluments of and arising from bridge and remainder of road, and for that purpose to take possession of toll-houses, &c., used in connection with road and bridge, and all materials that might then be upon the road or adjacent thereto, for purpose of building or repairing bridge or road, or erection of them; and out of tolls and emoluments to keep, firstly, a reasonable compensation for his trouble and expenses in repairing and managing bridge and whole of road, and secondly, to expend remaining portion thereof on bridge and whole of road until same were in good repair; and as often as such default should happen to enter and repair as aforesaid; but party of second part should not be

obliged so to enter or receive tolls ; but instead thereof, or if parties of first part should refuse or neglect to deliver to party of second part peaceable possession of bridge and remainder of road, party of second part should be at liberty to lay out his own money in repairing bridge and whole of road, and to charge ten per cent. for such advances, and money so expended should form a special lien and mortgage on bridge and remainder of road, and should have priority over all other liens and mortgages created after sale of such indenture ; and to pursue all means for foreclosure or sale of bridge and remainder of road for enforcement of such lien and mortgage.

4. Moneys so expended should be a debt due by parties of first part, who were to pay same to party of second part in quarterly instalments.

For due performance of all covenants therein contained, and as security to party of second part for due enforcement thereof, parties of first part granted and mortgaged to party of second part, his heirs and assigns forever, bridge and remainder of road.

5. Parties of first part covenanted, if more than \$17,000 should be due to Government, to pay off excess within six months : said indenture not to merge or interfere with an indenture of mortgage, by way of collateral security, dated 29th of May, 1865, made by Z. B. Choate to party of second part, for securing \$4,000 and interest, upon interest of Choate in bridge and remainder of the road ; nor was indenture to affect any other mortgage or security party of the second part held against Choate or against any of parties to said indenture.

Party of second part covenanted to pay money then due to Government under letters patent [not to exceed \$17,000] at time and in manner mentioned in patent, and to indemnify parties of first part, their heirs, executors and administrators in respect thereof.

6. While road and bridge were held from Government under letters patent, party of first part should pay all rates charges and assessments that might be rated or

imposed on bridge and road, including ten miles so sold to party of second part, and indemnify party of second part therefrom : provided that until default happened, party of first part should remain in possession of bridge and remainder of road.

By indenture, made 8th December, 1866, between same parties, indenture of 26th September, 1866, was recited, and it was further recited that parties of first part had agreed to sell equity of redemption and all other estate and title in bridge, and in a further portion of road in continuation southerly from southerly limit of ten miles belonging to party of second part to a point equidistant between Hamilton and Port Dover, but not less, however the measurement might be, than a point four miles south of the village of Caledonia.

Then parties of first part granted, released, conveyed and confirmed same unto party of second part, his heirs, executors, administrators and assigns, together with all toll-gates, toll-bars and toll-houses thereon, and all tolls and emoluments arising therefrom, and all other rights and privileges to said road and bridge appertaining. Parties of first part covenanted

1. That right of party of second part to purchase remainder of road should stand, and price should be \$12,000 :

2. That covenants to repair in indenture recited contained should remain binding on parties of first part, and should be considered as part of this indenture, as if same were inserted in it, and should extend to portion of road and bridge conveyed by this indenture, as well as to all other portions of road, and generally that recited indenture should remain in full force against southerly half of said road not sold to party of second part :

3. That they would put upon road forthwith and keep constantly employed thereon, in repairing same, two two-horse-teams with wagons and drivers, and keep whole of Hamilton and Port Dover road and Caledonia bridge in good repair, as mentioned in said recited indenture, and in addition to tests in said indenture mentioned, that sufficiency

or insufficiency of such repair might be decided and ascertained by any engineer appointed or named by party of second part for that purpose, and report or decision of such engineer should be binding and conclusive upon parties of first part, their heirs, &c.

4. That they would make further assurance.

It appeared by the evidence that the road from Jarvis, in the County of Haldimand, to the City of Hamilton, in the County of Wentworth, was in bad repair, and the Caledonia bridge also, sufficient of the road being within the County of Haldimand, where the venue was laid and the trial took place, to sustain a conviction. It was for the jury to say whether defendant Mills had had the road for such a sufficient time before the indictment was found as to have enabled him to repair it.

The only questions were the points of law reserved by the Judge for this Court.

The case was duly set down in Easter Term last, but stood over.

James Patterson now appeared for the Crown :—

The Crown had the power to dispose of this road and bridge as a public work, and to grant the tolls upon them, and the grantees thereby became responsible for keeping the road and bridge in proper repair as public highways. He referred to the following cases, *The King v. Kerrison*, 3 M. & S. 26 ; *The Queen v. Brown et al.*, 13 C. P. 356 ; *Com. Dig. "Franchise"* ; Consolidated Statutes of Canada, ch. 28, secs. 10–21–73–76 ; Consolidated Statutes of U. C. ch. 49, sec 84 ; *Rex v. St. Giles*, 5 M. & S. 260 ; *Rex v. Lindsay*, 14 Ea. 317 ; *Nicholls v. Allen*, 31 L. J. Q. B. 43.

No one appeared for the defendants.

A. WILSON, J. delivered judgment of the Court.

We know judicially that "The Hamilton and Port Dover Road" and "The Caledonia Bridge" were public works, because they are among those mentioned in the Consolidated

Statutes of Canada, ch. 28, intituled "An Act respecting the Public Works," sec. 10, and Schedule A. in that section referred to.

The sale was not made by the Crown under the provisions of that Act, which applies only to "Municipal Councils or other Local Corporations or Authorities, or with any company incorporated for the purpose of constructing or holding such work or works of the like nature."

But there is nothing to restrict the Crown, in the exercise of its general prerogative, from making sale of a work of this kind, subject of course to the public rights of travel upon and use of it, as a highway.

That there could have been no remedy against the Crown, while the road and bridge were vested in Her Majesty, if they happened to be so much out of repair as to constitute in fact a nuisance, will not prove that there can be no remedy against the Crown grantee; for an occupier of rooms at Hampton Court Palace, by the permission of the Crown, was held liable to a poor rate, though the Crown could not have been liable: *The Queen v. Ponsonby* (3 Q. B. 14.) See also per Blackburn, J., in the House of Lords, in *Jones v. Mersey Docks* (11 Jur. N. S. 747); *Regina v. Buccleugh* (1 Salk 358).

Perhaps, in such a case, the public remedy might have been against the municipalities, leaving them to take recourse, if they could, against the Crown, as in 1 Lord Ray, 725, where Lord Holt said:—"The inhabitants of every parish of common right ought to repair the highways, and if particular persons are made chargeable to repair the said ways by a Statute lately made, and they become insolvent, the Justices of Peace may put that charge upon the rest of the inhabitants."

But we need not say what might or could have been done while these works remained in the Crown: the question is what can now be done with respect to them when they are not in the Crown.

In *Regina v. Duchess of Buccleugh* (1 Salk. 358) it was held that the tenant of any part of a manor, which was

held by service of repairing a bridge or highway, was liable to the whole charge, and an indictment for suffering it to be out of repair was held to be maintainable.

It is taken to be quite clear law, that a service of this kind could be attached by the Crown to the grant of a manor; and in *Henley v. The Mayor of Lyme* (5 Bing. 91) it was held, that an action on the case would lie at the suit of an individual for special damage sustained by him by reason of the non-repair of sea-walls, which the defendants were directed to repair under the terms of a grant from the Crown, conveying a borough and pier or quay with tolls.

This was affirmed on Error in 3 B. & Ad. 77, and in the House of Lords, 1 B. N. C. 222. The liability of the Corporation was expressly put upon the ground that the subject of the grant and the duty imposed were of public concern, and therefore the ordinary common law liabilities and remedies followed, and that there was no difference between a liability by prescription, which implied a grant beyond the time of legal memory, and a liability arising by a charter but lately granted.

There can be no difficulty in holding that this liability to repair attached upon the grantees of the Crown, Choate and Kerr, and that they became responsible to the public by way of indictment, for default of duty, although they would also be liable to the Crown for the breach of their covenant contained in the grant: 3 B. & Ad. 77; and this liability followed and accompanied the transfer of the property, so as to make the purchaser of part, and the mortgagee of the rest of the works, Mr. Mills, the other defendant, liable also.

In *The King v. Kerrison* (3 M. & S. 526) an indictment was sustained against the defendant for not repairing a bridge, which had been built by certain persons who were authorized by Act of Parliament to construct a canal, and who for that purpose had cut through the highway and built the bridge over the cut, and who were authorized also to charge tolls on the canal, the defendant having become the owner and proprietor of the navigation, and therefore liable to repair the bridge.

The question is, in what manner and to what extent are these three defendants liable? Choate and Kerr are still owners in fee, in Equity, of the southerly half of the road; that is, they hold it as mortgagors in actual occupation, having the right of redemption, and, as we must assume, collecting the tolls; and they are liable *to the Crown* by their covenant to keep the whole of the works in repair, and to Mills, their co-defendant, by their covenant to repair the whole of the works, notwithstanding their sale in fee of a part of the works to him; and Mills is the owner in fee of the northerly end of the road and of the bridge, not bound by his agreement with Choate and Kerr to repair at all, but bound, as assignee to the Crown under the patent, to make such repairs. The Crown granted the whole of these works on the condition, among others, of keeping them in repair.

If land had been granted on such a condition, the whole property would have been bound, and by alienation of a part a severance is not made in the liability of the different owners or occupiers, but each one becomes subject to the whole charge, though they may have contribution among themselves: *Reg. v. Duchess of Buccleugh* (1 Salk 358); *Reg. v. Backnall* (2 Lord Ray 792). The same rule, because founded on the same principle, must apply to this case, for "as the whole manor and every part of it in the possession of one tenant was once chargeable with the reparation, so it shall remain, notwithstanding any act of the proprietor, and every one of the alienees, being tenants of any parcel either of the demesnes or services, shall be liable to the whole charge:" (1 Salk 358.)

Perhaps the Crown might have agreed that the grantees should not be liable to repair these works, : *Brett v. Whitcho*t (3 Mod. 96); but we have no doubt that an agreement between the parties themselves, who are bound to repair, cannot alter their responsibility to the public: 1 Ventris 90; *The King v. The Mayor of Liverpool* (3 East 86.)

We think the legal liability attached upon these three defendants, under the facts before stated, though we do not see

how the indictment was proved, charging the defendants as *lessees* of the highway. This part is not before us, and it could have been amended at the trial, if it had been noticed, or if it had been worth while to do so.

We answer the case reserved as follows :

That it was shewn the defendants were bound to repair the highway in question : that the patent is not *ultra vires*, and it did pass the soil and freehold, and the right and franchise of taking tolls thereon and in respect thereof, and that the road was not at the time when, &c., a Government work, to be repaired by the Government, but by the defendants : that it was not necessary, to maintain this indictment, that the certificate of the Government Engineer should have been first obtained, or that he should have condemned the road ; and we order that judgment shall be given on the said conviction and finding of the jury at such time and in such manner as the said Court of Quarter Sessions shall deem expedient.

Judgment accordingly.

HESKETH V. WARD.

Arrest on mesne process—Bail—Return of non est inventus to ca. sa. to fix bail—Render by bail—Escape-warrant—1 Anne, st. 2. ch. 16, & 5 Anne ch. 9—Voluntary escape from mesne process—Practice as to issuing ca. sa. in such case—Charging in execution, meaning of—Rules nisi, practice as to drawing up—Rescinding Judge's order, practice as to—C. S. U. C. ch. 9, s. 2.

When a party arrested under *capias*, pending action and before judgment, gives bail, and after judgment and *ca. sa.* to fix bail, returned *non est inventus*, is rendered to the Sheriff's custody by his bail, in their own discharge, such prisoner is still held under *mesne process*, and is not confined in execution.

The English Statutes 1 Anne st. 2, c. 6, and 5 Anne c. 9, relating to escape-warrants, are not in force in this Province (*A. Wilson, J. dissentiente.*)

After a voluntary escape from the Sheriff of a prisoner held under *mesne process*, plaintiff may proceed with his action, and, *Semble*, may issue a *ca. sa.* without affidavit, if he has had a *capias* pending action, or an alias *ca. sa.*, if the *ca. sa.* to fix bail has been returned *non est inventus*, and take the defendant thereunder; and at all events, plaintiff may have a *ca. sa.* issued on a new affidavit and re-arrest defendant.

Quære, whether, after voluntary return of escaped prisoner, a plaintiff cannot accept such return and lawfully charge his debtor in execution, by merely delivering a *ca. sa.* to the Sheriff: *Per A. Wilson, J.*

Charging in execution is the process whereby a prisoner in actual confinement is detained in custody, whether at suit of the same or a different plaintiff: *Per A. Wilson, J.*

When a rule *nisi* on the face of it refers to papers and affidavits filed, this is sufficient in ordinary cases; but in applications touching awards, and in proceedings to bring a person into contempt, the particular materials moved upon should be specified.

When an *ex parte* order made in Chambers is complained of, an application should be made to the Judge, upon summons, to rescind his own order, before appeal to the full Court; but the Judge sitting in *banc* may assent to his own order being moved against in the first instance: *Per Richards, C. J.* Such rule does not apply to cases where the authority and jurisdiction of the Judge making the order are questioned: *Per A. Wilson J.*

Meaning of terms "Statutes for the amendment of the law, excepting those of mere local expediency," used in Con. S. U. C. c. 9, s. 2, discussed.

In this action the defendant was held to bail and entered special bail: a writ of *ca. sa.* was issued in June last, was placed in the hands of the Sheriff to fix bail, and was returned "*non est inventus*". An action was commenced against the bail, and defendant was surrendered to the custody of the Sheriff of the County of York, and on application to a Judge, and payment of costs within eight days from the service of the writ on the bail, the proceedings against them were stayed. The defendant again gave bail to the Sheriff on the 10th August, 1867, pursuant to Consolidated Statutes, U. C. ch.

24, sec. 29, and on the sureties making the proper affidavit of justification, the Sheriff discharged the defendant from custody and permitted him to go at large. Pursuant to the condition of the bond then given, after due notice, application was made to the Junior Judge of the county of York to have the bond allowed. After hearing counsel for all parties, the Judge allowed the bond within the time prescribed by the Statute, by endorsing thereon, "This bond allowed 3rd September, 1867, (Signed), John Boyd, Junior Judge, County Court, County of York."

Defendant appeared to have performed all the conditions of the bond.

On an *ex parte* proceeding a warrant was issued by A. Wilson, J., for arresting defendant and committing him to close custody in the common gaol of the county or city, where the defendant should be apprehended by virtue of the warrant, there to remain without bail or mainprise until he should have made full payment or satisfaction to the plaintiff, or until the judgment should be reversed or discharged by due course of law, or until defendant should be therein otherwise discharged by due course of law. The warrant was issued on 20th November, 1867.

Before the County Judge the counsel for the plaintiff objected that the bond should not be allowed, as it was not the proper one to be taken; that defendant was not in custody within the meaning of the 29th section of the Statute, but that the 25th section of the Statute properly applied to him. The defendant and the Sheriff contended otherwise.

The plaintiff's counsel stated in his affidavit that he understood the Judge to allow the bond, as he considered all he was called upon to decide was the sufficiency of the sureties named in the bond under the 27th section, and deeming them sufficient he allowed the bond. He also stated he believed the Sheriff had suffered the defendant to make a voluntary escape, and had declined to recapture him or take him again into custody.

The bail-bond was allowed on the 3rd September. Afterwards the defendant applied to be discharged under the

provisions of the Insolvent Debtors Act. That application was disposed of about the end of the month of October, on the ground that the defendant was neither a prisoner in close custody, nor a person arrested under a *ca. sa.* who had given bail. The delay in applying for the escape-warrant arose mainly from the difficulty of ascertaining the practice in such cases, and determining what was the best course to adopt under the circumstances.

The warrant signed by Mr. Justice Wilson recited that the defendant was arrested in the suit and gave bail before judgment was recovered against him, and after judgment was recovered a *ca. sa.* to fix bail was issued to the Sheriff of the County of York and returned "*non est inventus*"; that the defendant's bail thereon surrendered him in their own discharge to the said Sheriff, who thereupon and thereafter permitted and allowed the defendant to go out of close custody and to be and remain at large, whereby the Sheriff suffered an escape of defendant, and he did make an escape from the said custody.

Robert A. Harrison, Q. C., obtained a rule *nisi* to supersede, set aside or rescind the said warrant, and to discharge the defendant altogether from custody, on the following grounds :

1. That the learned Judge had no power to make or issue such warrant, either by the common or statute law in force in this Province.

2. There was no escape, defendant being at large either by permission of the Sheriff, who, as the law stood, had authority to discharge him without taking bail, or in custody in execution before giving bail; or else the custody was illegal altogether, the writ of *capias* having been returned, in which case there could be no escape in contemplation of law, and so said warrant should not have been made.

3. That if there was an escape, it was a voluntary one, in which case the Sheriff could not retake the defendant at all, after the return of the process; nor could any escape-warrant be issued on such voluntary escape, and the said warrant therefore was illegal.

4. That if there had been an escape, even a negligent one, a warrant to arrest defendant and keep him without bail or mainprise would now be illegal and unauthorised, under the provisions of the Statute of Canada relating to imprisonment for debt.

5. That the warrant was illegal and irregular, because made without any notice to defendant.

J. A. Boyd shewed cause:—

As preliminary objections:

1. It does not appear that the rule was drawn up on reading the escape-warrant and Sheriff's return, which ought to have been done: *Dickey v. Mulholland*, 2 Pr. Rs. 169; *Jacob v. Ruttan*, 2 Cham. Rep. 138.

The escape-warrant having been drawn up on an *ex parte* application to a Judge, application should have been made to him to rescind it before applying to the Court: *Day v. Vinson*. 9 L. T. N. S. 654.

The *ex parte* application is the proper one: *Daniel v. Morewood*, 2 Ld. R. 92. Indeed, the application in its nature must be *ex parte*, for the defendant, if he had notice, might abscond before the warrant could be issued. The policy of the law is that if he has escaped he should be committed to prison again. *Paine's Case*, 11 Mod. 279, shews that where an escape-warrant was superseded, because the defendant was not in custody for not obeying an order, or decree, but for contempt in resisting an officer of the Court of Chancery, yet the Court of Queen's Bench said, as it appeared that he had escaped out of their gaol (the Marshalsea), they would *ex officio* remand him to it again.

Under 8 & 9 Wm. 3, cap. 27, sec. 7, it is provided that any prisoner *committed in execution*, who escapes by any ways or means howsoever, may be retaken by the creditor by any new *capias* or *ca. sa.*, or he may sue out any other execution on the judgment, as if the body of the prisoner had not been taken in execution. This clause, however, did not extend to authorise this defendant to be taken on another *ca. sa.*, because he was not confined in execution.

Unless the Statute 1 Anne, Stat. 2 cap. 6, and 5 Anne, cap. 9, are in force in this Province, plaintiffs have no

remedies against defendants, who are rendered in discharge of their bail after a *ca. sa.* is returned *non est inventus*. These Statutes are in force here by implication and under the Statute of Upper Canada, introducing into this Province the laws of England to a certain extent. Many Statutes, which might have been considered purely local, and many rules of law only applicable to the situation of things existing in England, have been held to be introduced into Upper Canada by the force of legislation and inference from the similarity of evils to be remedied. Many of these cases, in which English local acts are held to have been introduced into this Province by virtue of sec. 2 of the Statute consolidated as cap. 9 of C. S. U. C. without special enactment, are referred to in *Leith's Blackstone* 14-18.

Our Courts possess the same power to commit the defendant, he having escaped from prison, as the Superior Courts of Law in England : C. S. U. C. cap. 10, sec. 3 ; and *Mercer v. Hewston*, 9 C. P. 349, and the cases there referred to, establish that the Statutes of Mortmain were also introduced into the Province.

Regina v. Roblin, 21 U. C. 352, refers to the English Marriage Acts being in force here. *Dunn v. O'Reilly*, 11 C. P., 404, shews that part of an English Act containing many local provisions was in force here, so far as it related to making regulations respecting attorneys and solicitors, when other clauses are not ; some of the clauses of the Act being to regulate the assize of bread ; respecting the occupiers of locks on the Thames, and preventing the distemper spreading amongst horned cattle. *Reid v. Inglis*, 12 C. P. 191, shews that 1 W. & M. cap. 18, sec. 18, is in force as to punishing persons for disturbing religious worship : *Hodgins v. McNeil*, 9 Grant 305.

Though in the preamble to the Statute of Anne reference is only made to persons committed to the custody of the Marshal of the Queen's Bench and to the prison of the Fleet, yet it authorises the escape-warrant to be directed to all Sheriffs, and to be in force in all places in England and Wales, and it is declared to be a general law.

This remedy ought to be given to a plaintiff, otherwise he may lose his debt; for if the action for the escape must be brought against the Sheriff at common law, if he die it cannot be brought against his executors: *Gilbert on Executions*, 80; 2 Inst. 382; *Wheatley v. Lane*, 1 Wm. S. 218, note 5.

The Statute of 1 Ric. II, cap. 12, which gives an action of debt for escape, though only naming in terms the Warden of the Fleet, extends to all Sheriffs and not to the Wardens of the Fleet only: *Bonafous v. Walker*, 2 T. R. 129. This Statute is one for remedy of an evil which may apply to all persons, and therefore ought to have general application: *Atkinson on Sheriffs* (1861) 251; *Tidd's Practice*, 9 ed. 233.

The language of *Macaulay*, J., in *Evans v. Shaw*, Dra. Rs. at p. 36, shews an escape-warrant might issue in this country. If so, it could only be under the Statute of Anne.

Consolidated Statutes of Upper Canada, cap. 24, sec. 25 to 29 inclusive, are the sections requiring to be referred to. As defendant was really in on *mesne* process, secs. 25 and 28 apply to this case; but the bond is taken under sec. 29, which applies to parties in execution. The bond does not provide that the debtor will confine himself to the limits, as required by section 25.

Dorman v. Ranson, Tay. Rs. 357; *Kingan et al v. Hall*, 23 U. C. 503, are express authority that under our Statute this bond is void; that the Sheriff is liable for a voluntary escape; and that the approval of the bond by the Judge does not relieve the Sheriff: *Clap v. Cofran*, 7 Mass. 98; *Clap v. Hayward*, 15 Mass. 276; *Impey on Sheriff*, 143; *Colston v. Ross*, Cro. Eliz. 893. The defendant, after the surrender by his bail, was still in on *mesne* process. See *Thackray v. Harris*, 1 B and Ald. 212, as to escape. See also *Crompton v. Ward*, 1 Strange, at. p. 433; *Jackson v. Cooper*, 4 M. & W. 353, 354; *Allanson v. Butler*, Sid. 330; *Buxton v. Horn*, 1 Show. 174.

Permitting the defendant, in custody on *ca. sa.*, to go at large, through a mistake, is a voluntary escape: the Sheriff has no right to retake the defendant, and if he does

the recapture is a nullity: *Filewood v. Clement*, 6 Dowl 508; *Rigeway's Case*, 3 Coke 52a; *Atkinson, v. Matteson*, 2 T. R. 172; *Ravenscroft v. Eyles*, 2 Wil. 294.

Though the Sheriff might retake the defendant on a negligent escape on a *ca. sa.*, he could not do so on a voluntary one; but a plaintiff could issue another *ca. sa.* under the Statute of William and Mary. He cannot charge him in execution when the defendant is in on render of his bail after return of a *ca. sa.*: *Mosdale's Case* 1 Mod. 116; *Featherstonehaugh v. Atkinson*, Burr. 373; *Brigg's Case*, Skin. 582; *Brown v. Crompton*, 8 T. R. 434, 438; *Coleston v. Ross*, Cro. Eliz. 493; *Nyas v. Milton*, 4 M & W, 359.

The Statute of Anne allows the retaking and keeping in prison, in the nature of a punishment for the improper act of the defendant in escaping. *Hothershell v. Bows*, 6 Mod. 21, shews if defendant not charged in execution, when in on an escape-warrant, plaintiff may be non-prossed. *Webb v. Thompson*, 1 Str. 401; *Sir W. Moore's Case*, 2 Ld. R. 1028; *Paine's Case*, 11 Mod. 279,—shew the Court ought to remand him.

Anderson v. Hamslon, 1 B. & Al. 308, shews a person may be arrested without warrant, when the escape has not been voluntary and the party is supposed to be in custody all the time.

He also referred to *Cotton v. Martin*, 6 Mod. 73.

James Patterson, contra:—

As to the formal objection; the rule is drawn up, “on reading affidavits and papers filed.” The order, &c., are among the papers filed. It is only necessary to refer to the copy of the award, even in moving to set aside awards.

This is not a Judge's order in the ordinary sense, but a warrant in the nature of an execution that deprives the party of his liberty. It is not like a matter of amendment, or an ordinary step taken in a cause: *Bessey v. County of Grantham*, 11 U. C. 156. You can apply to the Court to set aside a *capias* when the Judge had no authority to make the order to issue it.

When the custody is illegal there can be no escape. He must be in custody on the *ca. sa.*, and the bond good, or he was illegally detained, and therefore no warrant could issue under the Statute. As the escape, if any, was voluntary, he could not be retaken : *Filewood v. Clement*, 6 Dowl. 508; Arch. Pr. 9 ed. I, 646.

The Statute is local, and not introduced into this Province by any enactment expressed or by implication. The keeper of the Fleet Prison and the keeper of the Queen's Bench Prison are not officers of the Sheriff, and the Statute was passed to give plaintiffs a right to have recourse against persons who escape thence; whereas, when they escape from other prisons, the remedy was against the Sheriff, when the escape was on *mesne* process : *Arch. Pr.* 11 ed. 692.

The affidavit is not sufficient under the Statute to authorise the warrant. It does not show an escape or any authority from the plaintiff for the application. The application was not made promptly: the defendant was set at liberty about the third of September, and this application not made until the 20th November.

Under the Statute the warrant should be applied for promptly.

The Consolidated Statute of Upper Canada, cap. 24, abolishing imprisonment for debt, renders this warrant in effect illegal : sec. 4, 5, 12, 13, 14.

See *Bac. Ab.* "Escape" (E).

The Statute does not extend to any county prison in England.

RICHARDS, C. J.—As to the technical objections:

1. That the rule is not drawn up on reading the warrant and the Sheriff's return. The rule is expressly to set aside the warrant, and the grounds on which it is sought to do so are mentioned in the rule. Reference is also made to affidavits and papers filed, and the warrant and returns are filed. In England the grounds of moving to set aside proceedings for irregularity are not necessary to be set out in a rule, it is said, though it is necessary in a summons taken out in Chambers for that purpose : *Patterson's Practice*, p. 1092.

The practice there and the forms shew that the rule *nisi* is drawn up on reading all the affidavits and other documents relied on. The forms of rules in *Chitty's Forms* begin in that way. In practice here, I think, we have not been so particular, if the grounds on which the party moves are set forth in the rule, as to require special reference to each affidavit and paper, except in reference to awards and proceedings when the party proceeded against is to be brought into contempt. On reference to the Master he states the general practice here to be the same that I have mentioned.

We think, as this is an application for setting a person at liberty who is now in close custody, that we would allow the rule to be amended in this respect, if necessary, but we do not think it necessary.

The next point is, that, as the order or warrant of the Judge was made on an *ex parte* application, he should have been first applied to to set it aside.

Day v. Vinson (9 L. T. N. S. 653) is referred to as authority on this point. There an order was made by a Judge, granting a certificate for costs. The Court refused to grant a rule *nisi* to set aside his order until he had been applied to; for perhaps he might be informed that he had been deceived, and would therefore rescind his own order. Here, however, the Judge who made the order was sitting in Court when the rule was granted, concurred in granting it, and thought it a proper case for the rule to go. Under such circumstances, the application being made on behalf of a party in custody, we do not think the objection should prevail.

The defendant must be considered as imprisoned on *mesne* process. We cannot refer to any decisions in our own Courts on the subject, except the case in *Taylor's Reports*; but I have a strong impression that when a defendant was rendered in discharge of his bail, after a return of *non est inventus* to a *ca. sa.*, it has been decided that he was not entitled to the weekly allowance to an indigent debtor confined in execution for debt.

In *Thackaray v. Harris* (1 B. & Ald. 212) the defendant had been arrested on a *capias*, and had put in and perfected

bail. A *ca. sa.* was lodged to fix bail and returned *non est inventus*. Before the return of the second *sci. fa.* the bail rendered their principal. Subsequently the defendant applied to be bailed again, on the ground that, as he had not been charged in execution, he was still in custody on *mesne* process, and having put in fresh bail, he was discharged out of custody. On proceeding against the new bail without a fresh *ca. sa.* the Court, though doubting whether the defendant was entitled to be bailed after a *ca. sa.* had issued, yet, as that had been done and defendant was liberated on the usual terms, were of opinion the bail was entitled to notice by means of a fresh *ca. sa.*

In *Jackson v. Cooper* (4 M. & W. 353) defendant had been arrested and gave bail to the action. Judgment was entered against him, and a *ca. sa.* lodged to fix bail. Application was made to discharge the defendant, as a person in custody on *mesne* process. It was argued for the plaintiff that as soon as a *ca. sa.* was lodged with the Sheriff, the defendant was no longer in custody on *mesne* process. For defendant it was contended the defendant was in custody on *mesne* process only. In giving judgment, Baron Parke said, "If the defendant were rendered, though he would still be in custody on *mesne* process, if he surrendered to the Fleet, yet he might possibly, before he could be released, be charged in execution, and if surrendered to the Sheriff in whose hands the *ca. sa.* is lodged, he would actually be in execution."

This defendant certainly cannot be considered as in custody under the *capias* to satisfy the debt, for that writ, we must assume, has been returned and enrolled and become part of the records of the Court, and by that he was not found in the County of the Sheriff, and no new writ having been issued, I cannot see how he can be considered as confined in execution, for there is no execution now current. The *ca. sa.* has been returned, and by the return, which we cannot contradict, the defendant was not found and cannot be supposed to be in custody under it after such a return.

With regard to the gaol limits, under the Statute 22

Vic. cap. 24, as consolidated from 19 Vic. cap. 43, if the Sheriff allows a defendant to go at large after a return of *mesne* process against him, or after his arrest on final process, though the defendant may confine himself to the limits, and comply with all the conditions of the bond to be given to the Sheriff, the latter will be considered guilty of a voluntary escape, when so permitting a defendant to go at large, without giving the bond prescribed by the Statute. This, I understand, is the effect of the judgment in the case of *Kingan et al. v. Hall* (23 U. C. 503); and that case seems to go to the extent of deciding that the Sheriff would be liable in an action for an escape, though the bond, defective in form, taken by the Sheriff, was approved by the County Judge. Under 11 Geo. IV. cap. 3, if the defendant confined himself to the limits, the Sheriff was not liable for an escape.

We must, then, consider this case as one in which a defendant confined in gaol on *mesne* process, and thus in the custody of the Sheriff, has (escaped) gone at large from out of his custody, by the voluntary act of the Sheriff, and say if there is any law in force in this Province that authorises the arrest of the defendant and his confinement in gaol under a warrant like that under which this defendant is now imprisoned.

It is not pretended that this warrant can be issued under any other law or authority than the Statute 1 Ann, Stat. 2, cap. 6.

The Statute seems confined in its terms to prisoners, legally committed to the custody of the Marshal of the Queen's Bench and to the Prison of the Fleet, procuring liberty to go at large and escape without making satisfaction to their creditors. It enacts that if any person committed, rendered or charged in custody of the Marshal of the Queen's Bench for the time being, or to or in the Prison of the Fleet, either in execution or upon *mesne* process, * * * and such person shall at any time after such commitment render, charge, or, being in execution (and before payment of the debt for the recovery of which such

person was being proceeded against) * * * make any escape from the custody of the Marshal of the Queen's Bench for the time being, or from the prison of the said Queen's Bench, or from the prison of the Fleet, or either of them, or shall go at large, it shall be lawful, upon oath thereof in writing, to be made by one or more credible persons before any one of the Judges of the Court where such action was entered, or judgment and execution were obtained, or where the party was so committed or charged as aforesaid, to and for such Judge, before whom such oath shall be made, and such Judge is hereby authorized and required from time to time to grant unto any person whatsoever, who shall demand the same, one or more warrants under his hand and seal (which warrant or warrants shall be in force in all places whatsoever within the Kingdom of England, Dominion of Wales, and town of Berwick-upon-Tweed, directed to all Sheriffs, &c., commanding them in their respective counties, &c., to seize and retake such person so escaped or going at large, and such person forthwith to commit to the common gaol of the county where he shall be retaken, there to remain without bail until they shall have made full payment and satisfaction to the plaintiff's creditors in such action or execution named, or until judgment in such action shall be reversed, or until judgment be given for the person so committed; and the Sheriff after execution of such warrant shall return the same to the Court wherein the action is pending, or execution had.

None of the cases referred to shew that this Statute was ever held in England to apply to issuing an escape-warrant, where a person in custody escaped from any other prisons than the two named in the Statute.

The preamble of the Act refers to the persons confined in those prisons having by bribes and illegal practices to and with the Marshal of the Queen's Bench, or to and with the Warden of the Prison of the Fleet, or some of their officers or servants, or other persons in trust for them, frequently procured from such Marshal or Warden liberty to escape and

go at large without making satisfaction to their creditors, or paying their debts, as well to the damage of creditors, discouragement of trade, as in defiance of good and wholesome law made to restrain such abuses.

The Statute 8 & 9 Wm. III. cap. 27, passed some five years before this, refers to the ill practices of the persons who executed the offices of Marshal of the King's Bench, Warden of the Fleet and other prisons, directs that all persons committed to the King's Bench and Fleet, either on contempt, *mesne* process, or in execution, shall be actually detained within the prisons or the rules of the same, until thence discharged by due course of law, otherwise the officers shall be considered guilty of an escape.

Upon judgment in an action of escape, the fees of the Marshal or Warden were to be sequestered for the satisfaction of such judgment.

The 4th section recites that it was notorious that large sums of money were given to and received by persons executing the office of Marshal, Warden, and other Keepers of prisons within the Kingdom, to assist or permit persons in their custody to escape: any of these officers convicted of such offence to forfeit £800 and his office.

The 6th section declares that no retaking on fresh pursuit shall be given in evidence in an action for an escape, unless specially pleaded, nor should such plea be received, unless the person against whom the action was brought, should make an oath in writing that the prisoner, for whose escape the action was brought, did without his consent, privity, or knowledge, make his escape.

The 7th section provides that when any prisoners confined in execution should escape, their creditors might retake them by any new *capias* or *ca. sa.*, or sue forth any other writ of execution on the judgment, as if the body of the prisoner had never been taken in execution; but this is said to be only in aid of the common law. See *Jones v. Pope* (1 Williams Saunders, 35 N. 1) where, on the authority of the case 1 Sid. 330, and others there cited, it is said the plaintiff may both in negligent and voluntary

escapes retake the defendant by a new *capias ad satisfaciendum*.

The reason given why the Courts decided finally at Common Law that the person escaping voluntarily, when confined in execution, could be taken on a new writ was, that the defendant ought not to be permitted to take advantage of his own fraud, and the plaintiff ought not to be turned over to an insolvent gaoler for satisfaction.

We are pressed with the argument that, if after a voluntary escape on *mesne* process the plaintiff cannot take the defendant on an escape-warrant, that if the Sheriff should prove to be insolvent, the plaintiff would lose his debt. Would not this same argument have extended to every case in England before the passing of the Statute of Anne, when such escape was from the Sheriff and not from the King's Prison or the Fleet? If so, it seems to me the argument of necessity was as powerful in England for very many years as it is here, and yet never produced the change of the law there.

I am not prepared to assent to the doctrine that, where after judgment and before being charged in execution, a defendant confined in prison on *mesne* process escapes by the voluntary act of the Sheriff, that the plaintiff may not, nevertheless, take the defendant in custody on a *ca. sa.* I fail to see how his judgment has been satisfied, so as to prevent his enforcing it by any remedy he may choose. At all events, he might take him on a *ca. sa.* issued on a new affidavit. Even before appearance, if the party escaped by collusion with the Sheriff's officer, and the plaintiff would be prejudiced by the escape in the recovery of his debt, the Court or Judge might permit a second arrest for the same cause, when such arrest would not be vexatious.

I do not think the argument, of necessity, can have much effect.

The Statute in England seemed to be passed with reference to the peculiar position of the officers of the prisons to which it referred and the evils recited in the preamble, which state of things has not and is not likely to exist in this country.

The particular case before us is not one which should induce us to desire to introduce the Statute here, with the serious injury which it may be made to work against a defendant, who apparently had no desire to evade the law, but, from some misapprehension as to what the law was, is charged with having escaped from the Sheriff, after having given what both the Sheriff and himself considered was the proper bond on which he might be permitted legally to go at large.

One of the cases referred to by Mr. Boyd, *Jones v. Price* (2 Lev. 132), states circumstances which seem fully to justify the strong language used in the preambles to the Acts of Parliament quoted, as to the conduct of the officer of one of the prisons referred to. I quote the effect of the observation on this point when referring to a voluntary escape ; "The party has an interest in the body or the pledge until his debt is paid, though if the prisoner should bring trespass against a gaoler that detained him after a voluntary escape, he could not defend it. The mischief would be exceedingly great, if the Sheriff or other officer might at his pleasure put the plaintiff only to an action against himself ; for this last vacation the Warden of the Fleet turned as many prisoners at large as their debts came to £80,000, and ran away himself."

In *Evans v. Shaw* (Dra. Rs. 14) the action was by the assignee of the Sheriff against the bail to the limits, who contended that as the defendant in the original action had returned to the limits before the action was brought against the bail, they were not liable. Sir James Macaulay, in his judgment, remarks incidentally, no doubt looking to the English decisions on the subject, for he refers to 1 Vent., 2 Lev. 109, 132, "After a voluntary escape the plaintiff can, if defendant at large, obtain an escape-warrant: he is not obliged to resort to the officer."

The cases he refers to are to the effect, that after a voluntary escape in the time of one Warden and a return to custody in his time, and a second escape in the time of the second Warden, the plaintiff can hold the last Warden for

the second escape which took place in his time, for the plaintiff always had an interest in the body of the pledge, as I have already quoted. The remedy referred to under the escape-warrant did not in fact exist at the time this case in Levinz was decided. That case was decided in Charles the Second's reign, and the escape-warrant, so-called, was introduced under the Statute of Anne; but the plaintiff, when the case in Levinz was decided, could have re-arrested the defendant in the original action under a new writ of *ca. sa.* at the common law.

I see no necessity of the Statute of Anne being introduced into this country to enable a plaintiff to obtain possession of the body of his debtor when he has escaped. No doubt, by issuing the escape-warrant some advantages were obtained by allowing it to run all over the kingdom, and by the speedy pursuit it enabled a plaintiff to take; but I think the necessity of having *rules*, to which debtors confined in custody might resort, like the rules of the prisons referred to in England, was much greater in point of humanity, and as carrying out the English idea of the custody of debtors, than introducing the escape-warrant; yet I have never heard it suggested that there was no necessity for Legislative enactment to declare the limits attached to the county gaols, and to authorize Sheriffs to give debtors the privilege of enjoying these limits without being liable for an escape.

We have had the law of arrest in force in this Province for over fifty years, and we have no recorded cases or traditions amongst the bar of the issuing of an escape-warrant in this Province under the Statute of Anne during that period.

The Legislature have from year to year been passing laws to mitigate and diminish the power which creditors had over their debtors to deprive them of liberty, and I do not think, unless it appears from plain intendment or direct enactment that the Statute referred to is in force here, we ought in a doubtful case to hold it to be in force.

In terms it is only applicable to the two English prisons

named in it, to remedy evils which the preambles to that and some other Acts refer to as peculiar to persons of the descriptions there referred to, and as to which no apparent necessity exists in this country.

It seems to me that the misapprehension as to the rights of a plaintiff against a defendant, when there was a voluntary escape on *mesne* process, arises from not considering what it is the Judges are referring to when they use the language which has been quoted to us in *Ravenscroft v. Eyles* (2 Wil. 294). The facts were as follow: One Warner being in prison in custody of the Warden of the Fleet, at the suit of one Palmer, the plaintiff delivered a declaration against him there. Afterwards the defendant voluntarily permitted Warner to escape and go at large. Plaintiff, not being satisfied of the damages claimed in the declaration, with knowledge of such escape, afterward proceeded with his cause and obtained judgment against Warner, and subsequent thereto commenced his action against the defendant for the escape. Warner had returned to the Fleet prison the same day he escaped, and afterwards continued in prison in close custody of the defendant. The question was, whether the plaintiff could recover against the defendant, he having obtained a judgment against Warner. In giving judgment, Wilmut, C. J., said: "It was urged that Warner had returned to the custody of the Warden of the Fleet, and was there then; but to this I answer, that when a gaoler permits a voluntary escape, from that moment he commits a tort and a plaintiff has a right to recover such damages as a jury shall please to give for the same. The prisoner, when voluntarily suffered by the gaoler to escape, is instantly at large: the gaoler cannot afterwards retake him for the same matter. The plaintiff may take him by an escape-warrant, but has his option to proceed as he pleases, either against Warner to judgment and *execution in this case*, or against the Warden. I say Warner is not now a prisoner at the plaintiff's suit: although he be locked up every night, and though the plaintiff may lawfully proceed to judgment against him, yet he could not charge him

in execution, and the case of *Key v. Briggs* (Skin. 582) is directly in point.

Key v. Briggs was an action against the Marshal for an escape on *mesne* process. It was held, that though after an escape the plaintiff could not charge the prisoner in execution upon the judgment, yet he might prosecute him to judgment as well as if he had remained in actual custody. That action was not brought for an escape after being charged in execution, but for an escape to prevent plaintiff charging him in execution, and this is all one be it before or be it after judgment obtained.

The effect of all this, as I understand it, is merely to decide that if a prisoner is not legally in the custody of the Marshal or Warden, you cannot charge him in execution. It does not decide that the plaintiff's claim against the defendant in the original action is extinguished, for in the case in *Wilson* the Chief Justice expressly says he may proceed to judgment and execution. I see no reason, therefore, why the plaintiff may not proceed against the original defendant by any species of execution either against his person or goods.

This distinction as to being charged in execution, when in the custody of the Warden of the Fleet, on a surrender on *mesne* process, and when surrendered to the Sheriff in whose hands the *ca. sa.* might be, is referred to by Baron Parke in *Harrison v. Dickenson*, already quoted. The proceedings to charge a defendant in custody in the Queen's Bench or Fleet Prisons, before the passing of the Act 5 & 6 Vic. cap. 22, will be found in *Tidd's Practice*, 9th edit., and since that Statute, to charge them in custody in the Queen's prison, in *Chitty's Arch.*, 11th ed., p. 1199. There seems to be very little difference in substance as to the mode of procedure before and since the passing of the Act of 5 & 6 Vic.

After the best consideration I can give the subject, I have arrived at the conclusion that the defendant is entitled to be discharged out of imprisonment in this case. I feel bound to say that the case is one in which I have had no little

difficulty in making up my mind. When so great a lawyer and so painstaking a Judge as the late Sir James Macaulay has stated, even in an *obiter dictum*, that an escape-warrant to arrest a prisoner confined in execution for debt may issue in this country, we may well hesitate and doubt before deciding against his view, it being understood that the escape-warrant he refers to is the one which in England would be issued under the Statute of Anne; and when a Judge, having the experience and knowledge of practice of my brother Adam Wilson, has adopted that view and actually issued an escape-warrant under that Statute, considering it in force in this country, I cannot but feel that it is a case in which the most confident might hesitate as to the correctness of their views in deciding the Statute is not in force here. But the defendant in this cause being confined in prison has a right to my opinion, right or wrong, and as it is in his favour I feel bound to express it at once. If I thought further discussion and consideration would induce me to change my views, I might delay, at least for a short time; but as I do not anticipate that a further delay would change the opinion I have formed, I feel it my duty to express it now.

I think the rule to be granted in this case should be simply to discharge the defendant out of the custody of the Sheriff in this cause.

A. WILSON, J.—The main question is, whether the Statute of Anne, under which the escape-warrant was granted, is in force in this Province.

It is contended it is not applicable here, because it is confined in England to the two particular prisons, the Marshalsea and Fleet, mentioned in it, and does not apply to the prisons of England generally.

No doubt this is so, and so far as we have been able to discover, there is no case in which the powers of the Act have been used, unless the escape has been from one or other of these two prisons.

I think, therefore, taking the very precise and special

language of the Statute, with the absence of all practice in issuing the escape-warrant in other cases than in escapes from the Marshalsea or the Fleet, it must be admitted the Statute does not apply to any other prison in England than to these particular prisons.

It is not denied that if this Act had been general in its provisions to all the prisons of England, it would have been in force here.

The question then is, because the Statute does not apply to the prisons of England generally, is it to be held for such cause to have no operation here at all ?

The Statute applies to those two places which were at that time especially the prisons of the Superior Courts of common law and equity; the Marshalsea being the prison of the Queen's Bench, and the Fleet being the prison of the Courts of Common Pleas and Exchequer, and of the Court of Chancery.

If in this Province there had been some prison which was peculiarly the prison of this Court, as the Fleet is of the Common Pleas in England, I presume it might be argued and maintained that, as the state of things here was precisely like the state of things in England in this respect, each having its peculiar prison, the Statute of Anne was applicable here to escapes from the special prison of the Court, although such prison was neither the *Fleet* referred to in the Statute, nor even called by that distinctive name.

Now, because we have no such particular prison, it is not in my opinion any sufficient reason for holding the Statute not to be applicable to this country. It is a Statute general and beneficial in its terms and object, applicable to all escapes from the immediate particular prisons of the High Courts of Law and Chancery, and is to be expounded, as the Act declares, "beneficially, for the preventing of all mischiefs, abuses, escapes, and other inconveniences herein provided against," and is to be "taken to be a general law."

The first Statute which was passed in this Province after the Constitutional Act of 1791, was one which declared

that "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same;" and not long after another Statute was passed, by which the Court of King's Bench [as it was then styled] was established, and by which it was created "a Court of Record of original jurisdiction," and by which it was declared and enacted that such Court "should possess all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction, in as full and ample a manner as may be done in any of His Majesty's Courts of King's Bench, Common Bench, or, in matters which regard the King's revenue, by the Court of Exchequer in England;" and by the amended Act, relating to the Court of King's Bench, passed in 1822, it was re-enacted, in continuation of sec. 14 of the Act of 1794, "that each and every of the Statutes of Jeo-fails, and each and every of the Statutes of Limitation, and each and every of the Statutes for the amendment of the law, excepting those of mere local expediency, which from time to time have been provided and enacted respecting the law of England, be adopted and declared to be valid and effectual for the same purposes in this Province."

These provisions are now embodied in chapters 9 and 10 of the Consolidated Statutes for Upper Canada. This last Act includes the provisions of the 12 Vic. c. 63, as applicable to the Common Pleas. These two Courts are now declared by Statute to be Courts of co-ordinate jurisdiction.

The claim which this plaintiff makes to have his debtor who had escaped from custody retaken, if it can be done, is a "civil right," and the Statute of Anne as to recapture may properly enough be said to have been and to be a Statute "for the amendment of the law," and to be one of not "mere local expediency." How far every Statute may be said to be in amendment of the law, I need not say: it is a very comprehensive expression, and was meant, I have no doubt, to be liberally interpreted. But a Statute which was

said the very year after it was passed to have been "made to suppress a mischief and ought to be extended," (per *Powell, J.*, in *Sir Wm. Moore's Case*, 2 Lord Ray 1028), and which declares within itself that it shall be taken to be "a general law," and "be construed beneficially for the preventing of all the mischiefs, abuses, escapes, and all other inconveniences herein provided against," may well be considered to be a Statute "for the amendment of the law," and be in force by virtue of such enactment in this Province.

It may be said that the Statute of Anne, reciting special circumstances for the making of the law, "that divers persons heretofore legally committed by Her Majesty's several Courts of Record at Westminster to the custody of the Marshal of the Queen's Bench and to the Prison of the Fleet upon action, have by bribes and illegal practices to and with such Marshal or Warden or some of their officers, frequently procured from such Marshal or Warden, liberty to escape and go at large without satisfaction made to the respective plaintiffs, as well to the great damage of honest creditors, the decrease of personal credit and discouragement of trade, as in open defiance to all good and wholesome laws heretofore made to restrain such abuses," shews such a state of things, as specially existing at that time, which called for the additional powers which were given to the Courts, and for the further rights which were granted to creditors, and which did not at any time exist in this Province, and so render the Statute quite unnecessary and inappropriate in this Province.

I think much stress cannot be laid on this argument, for no doubt, if it were necessary, multitudes of Statutes passed in by-gone times could be referred to which contained recitals explaining the cause of their being passed, which would by the same rule equally be prevented from being adopted in this Province, although of the most general and beneficial nature. I may refer to one which has a direct bearing on this very subject, to shew that such recitals cannot determine the question.

The 8 & 9 Wm. III. c. 27, which declared that the Marshal

of the Queen's Bench prison, the Warden of the Fleet and the keepers of other prisons should keep their prisoners in close custody, unless duly authorized by rule to permit them to be out, and by which various other salutary provisions are made, such as obliging the officer to plead specially a retaking on fresh pursuit, authorizing a creditor to sue out a new *ca. sa.* against his debtor in execution who has escaped, compelling the Marshal to produce his prisoner to the creditor on a twenty-four hours' notice, otherwise to be deemed to be guilty of an escape, &c., &c.

Now, this Statute recites that, "Whereas by reason of the many grievous extortions and ill-practices of such persons, who have for several years past respectively executed the offices of Marshal of the King's Bench, Warden of the Fleet and Keeper of the Marshalsea, Newgate and other prisons, and by several pretended privileged places within the realm, both creditors and debtors have been notoriously abused, and the good intents of the law wholly eluded, for reformation thereof, &c." Nothing could be more inappropriate to us in this Province than a law founded upon a such a state of facts, if these facts are to be taken as the means of determining whether the particular law shall or shall not be in force as part of the general law of England in this Province.

But I imagine that re-capture on fresh pursuit had always by reason of that Statute to be specially pleaded here: *Evans v. Shaw* (Draper's Rep. 35); and there is no doubt that the 8th sec. of the Act, as to the Sheriff producing his prisoner to the creditor on a twenty-four hours' notice, has been considered to be the law with us, for *Wragg v. Jarvis* (4 O. S. 317) is an express decision on the point.

If, then, the recitals in an English Statute are not peremptorily to decide the question whether that Statute is or is not in operation here, we are brought back to the same point again, is this particular Statute in question to be deemed not to apply to any one of our prisons, because it does not apply to every one of the English prisons?

I conceive that it is sufficient for us to say that, although

it may have a limited application in England to the two special and peculiar prisons of the Courts, it is nevertheless a general law and a beneficial one, and an amendment of the law, and as there are no special prisons of the Courts here, but all the gaols of the Province are equally the prisons of the Court, the Statute being such general law by the declaration of the Statute itself, has an operation here upon all the prisons of the Courts.

Mr. Justice Macaulay, in *Evans v. Shaw* (Draper Rep. 36), seemed to consider that the law as to escape-warrants was a part of our law and procedure; for he says the "plaintiff," if his debtor be at large, "can obtain an escape-warrant." This must not, however, be pressed as a decision upon the point, for it is not: it is a mere statement made by him in the course of his judgment, in discussing various matters, by way of argument and illustration as to whether a voluntary return before action against the sureties was an answer in an action against them on their limit bond; and therefore his attention cannot be said to have been fully called to the question whether the Statute, which gives the escape-warrant, extended to this Province or not. Still, it is a matter for consideration that a Judge so extremely cautious in his expressions and opinions, and so sound in his judgments and conclusions, was of opinion that the remedy by escape-warrant was sanctioned by our law.

In the case of *Baldwin v. Roddy* (3 O. S. 166) the question was, whether the Imperial Statute 19 Geo. III. c. 70, was in force here. Mr. Justice Macaulay, for the reason stated in 2 O. S. 518, and chiefly, I think, because it was by subsequent Statutes extended to particular local Courts, such as the Court of Requests in Manchester, considered it was an act of mere local expediency, and therefore not adopted here. The Chief Justice and Mr. Justice Sherwood considered it to be a general law and quite applicable to our wants and procedure, and therefore a part of our law. Part of the observations of the Chief Justice may be said to apply against the view which I take, where he says the law is general in its nature, giving power to all the Courts at

Westminster to enforce the judgments of *all* the inferior Courts of Record in England; but he also considered that the extension of the Statute by later Acts to certain other Inferior Courts not of record, did not prevent its incorporation into our law, although we could not apply it as extended in its locality. And I can perceive a plain distinction between the removal of judgments of only particular inferior Courts, and the right of apprehending by a particular process all the prisoners of all the Superior Common Law Courts from their own special and peculiar prisons. The 13 Eliz. c. 10, is a general law, for it applies to all ecclesiastical persons, *except Bishops: Bac. Ab. "Leases"* (E).

There is a very excellent comment upon what part of the English law is and what is not adopted into our law in *Leith's Blackstone*, 14 to 18, to which we were referred, and which contains a reference to all the decisions in our Courts on the subject.

The practice of proceeding in England against prisoners shews that until the 4 and 5 Wm. & M. c. 21, every prisoner not already in the custody of the Marshal or of the Warden had to be removed by *habeas corpus* from the custody of the Sheriff or other officer, in whose possession he was, into the prison of the Superior Court in which the writ was pending, before he could be served or charged with a declaration in the cause; and although the Statute just referred to permitted the plaintiff to serve his declaration on the prisoner, or on the keeper of the gaol where the defendant was, without removing him by *habeas corpus* as before to the special prison of the Court, yet the plaintiff was not obliged so to proceed against his debtor, and he might, notwithstanding the Statute, proceed as before it, and remove his debtor by *habeas corpus* to the prison of the Superior Court: *Tidd's Pr.* 9 Ed. 341, 2, 8; and the defendant could remove himself by *habeas corpus* from the Sheriff's custody into the custody of the Marshal or Warden as well as the plaintiff could, and he usually did so in consequence of the greater privileges he enjoyed

by the regulations and practice of these prisons, of being on the limits without their walls, or of going out under day rules which were very liberally granted: *Tidd's Practice*, 9th Edition 373, 4.

The consequence was that at the time when the Statutes of Anne were passed, in the first year of her reign, very few debtors had probably remained out of the bounds of the two great prisons, considering the advantages they enjoyed by a removal to them, and the facility of so removing, and the very few years that had elapsed since the Statute was passed authorizing plaintiffs to proceed without actually removing them.

The Statute of Anne, therefore, though not in language applying to the gaols of the counties, did in fact most likely include every debtor, and certainly every debtor of any consequence, in England.

It was practically, though not in its terms, of almost universal application.

It is somewhat strange that while the 1 Rich. II. c. 12 applies exclusively in its construction by the Courts to all gaols, that the Statute of Anne was not by the same process extended in like manner: *Bonafous v. Walker* (2 T. R. 126); *Platt v. The Sheriff of London* (Plowd. 35).

I cannot conceive a more important question can arise than one concerning the jurisdiction of Courts and Judges, and although it is greatly commended that remedies be enlarged to meet just demands, yet it is never approved that jurisdiction shall be assumed or usurped. The maxim is *est bonis judicis ampliare jurisdictionem*; but perhaps in a case of this consequence, as I did doubt my power before granting the order, it would have been better to have referred the plaintiff to the full Court, particularly as the defendant was to be so seriously affected by my order, and there might have been no actual danger, from his having given security to the Sheriff, of his leaving the limits until action could have been taken on the considered judgment of the Court. It was the apprehension of his going, if he had notice of the proceedings which were being taken against him, which induced me to make the order.

Since the discussion of this case, I have from its importance examined every authority which was cited, and I have observed nothing which has altered my opinion as to the power which I exercised, though, as I have said, I am not satisfied I acted as advisedly as I should have done under the circumstances.

The preliminary objections, perhaps, should not have been taken in a matter of this kind; but I think they cannot prevail. That the application to review or rescind the decision of the Judge, who granted the escape-warrant, should have been made firstly to him, because it was an *ex parte* proceeding, and he might, on reconsideration, have altered or amended his order, is not sustainable when the motion is one affecting the Judge's authority and jurisdiction.

Then, as to whether the rule *nisi* should have been drawn up on reading the escape-warrant. The general practice is that it should be so drawn; but if the warrant or a copy of it be here in Court, it will, I think, be sufficient: *Atwill v. Baker* (5 Dow. 462); *Bland v. Dux* (8 Q. B. 126).

It was contended that the escape-warrant should be set aside, because it issued on an *ex parte* application and without notice to the debtor, or calling upon him to shew cause why he should not be retaken. The objection is one which quite answers itself. As well might any other debtor be called upon to shew cause why a *capias* or *ca. sa.* should not be issued against him before he was arrested, as call upon the defendant in this case to shew cause. In most instances there would be no cause to shew and none would be shewn; but then there would also be no necessity for taking out the *capias*: the timely warning would have answered the purpose, and arrest for debt would thus effectually, though not very directly, be at last abolished. The authorities bear all the other way.

For the plaintiff it was maintained, as an additional reason why this Statute should be held to have been received here, that if the defendant escaped as he had here in this case from *mesne* process, by the voluntary act of

the Sheriff, the plaintiff had no means of charging the defendant in execution, and so the security of the debtor's person was lost, and the only redress left was by an action against the Sheriff.

In many cases it has been said that it is unreasonable the defendant should take advantage of his own wrong, and that the plaintiff should be driven to seek for redress only against the Sheriff, who might happen not to be worth anything, and that such a course would give the Sheriff the control of every plaintiff's suit and debt, and the privilege of discharging every debtor at his mere pleasure. The authorities are quite clear, before the passing of the 8 & 9 Wm. III. c. 27, that if the debtor in execution escape, even by the consent of the Sheriff, the plaintiff may, if he please, retake him on a fresh *ca. sa.*, although the Sheriff, of his own act, can never retake him: *Basset v. Salter* (2 Mod. 136); 1 Ventris 4. *Allen v. Vinter* (Sir T. Jones 21); *James v. Pierce* (1 Ventr. 269); *Mounson v. Cleyton* (Cro. Car 240); *Boyton's Case* (3 Co. 44 b); *Allanson v. Butler* (1 Sid. 330); *Rigeway's Case*, 3 Co. 52 b.; and all of which are referred to in *Filewood v. Clement* (6 Dowl. 508). There are numerous other cases to the same effect.

The Sheriff of Essex' Case (in Hob. 202) was to the contrary, and even as late as *Buxton v. Horn* (1 Show. 174), though the Court held that in a voluntary escape by the Sheriff, "the Sheriff cannot take the party again, yet against the plaintiff it is no bar;" and the Reporter, who was stopped by the Court, says, "so they all gave rule for judgment for the plaintiff without hearing any argument, which was intended as follows." * * * * *

Then he sets out his argument against the view of the Court, but at the conclusion he states, "in truth when I demurred I knew not of the judgment in the case of *Allanson v. Butler*, in the time of Charles the Second, which is true law."

This case was in 3 Wm. & M. Then the Statute of 8 & 9 Wm. III. c. 27 was passed, which provided that if a prisoner

in execution escaped by *any means*, the plaintiff might retake him by a new *ca. sa.*, or sue out any other execution as if he had never been in custody.

It is singular, then, to see in *Biddulph v. Bruce*, 12 Mod. 230, in the 10 Wm. III., that Lord Holt is even *after* this Statute reported to have said, "if the Sheriff suffer one in execution to escape, the plaintiff has his election to sue the Sheriff upon an escape, or else the defendant, but he cannot have a *capias* against the defendant without a *sci. fa.*"

In *Gillet v. Astin* (7 Jur. 235) Mr. Justice Patteson remarked to Counsel, "Your argument would go to shew that the Statute of Wm. III. was unnecessary."

But all these are cases of escape from execution; and it was said that on voluntary escape from *mesne* process, even the *plaintiff* in England, unless he retook the defendant under an escape-warrant, could not charge him in execution, and therefore the plaintiff is remediless here, if he cannot retake under the Statute of Anne. The cases relied on for this purpose were *Fetherstonhaugh & Wife, Administratrix, v. Atkinson* (Barnes, 373). The defendant was a prisoner on *mesne* process, and the keeper of the Marshalsea gave him the liberty of the gate, that is, to have his liberty, on his promise to return whenever he was called upon. The original plaintiff got judgment. On his death the present plaintiffs revived it by *sci. fa.* and obtained an award of execution. They then *charged* the defendant, still a prisoner on the books, with a *ca. sa.* as a prisoner in custody of the Sheriff of London; whereupon the keeper endeavored to persuade the defendant to return to custody, but he would not, so the keeper retook the defendant without any warrant. The Court, holding his escape to have been voluntary, said the keeper could not retake him, and therefore discharged the defendant from custody.

In *Ravenscroft v. Eyles* (2 Wils. 294) the plaintiff charged Warren, the debtor, who was then a prisoner in the Fleet at the suit of one Palmer, with a declaration, having first made an affidavit of his cause of action so as to detain him at his suit. The defendant then per-

mitted the debtor voluntarily to escape: the plaintiff knew of the escape, and went on with his suit and got judgment against the debtor, and then sued the defendant for an escape. *Wilmot*, C. J., said: "The prisoner, when voluntarily suffered by his gaoler to escape, is instantly at large: the gaoler cannot retake and detain him for the same matter. The plaintiff may retake him by an escape-warrant, but has his option to proceed as he pleases, either against his debtor to judgment and execution in this case, or against the Warden.

I say Warren [the debtor] is not now a prisoner at the plaintiff's suit, although he be locked up every night, and though the plaintiff might lawfully proceed to judgment against him: yet he could not *charge* him in execution, and the case of *Key v. Briggs* (Skin 581) is directly in point. I have not the least doubt but that judgment must be for the plaintiff, and if we should do otherwise we should permit every gaoler in England to let his prisoners go at large as much as if they had never been arrested. If an escape be voluntary in the gaoler nothing will afterwards purge it."

Key v. Briggs (Skin. 682) was an escape before judgment, in which the plaintiff declared against the Marshal for such escape, by reason of which the plaintiff was prevented from charging the debtor in execution, and the Court said that after an escape the plaintiff cannot charge the debtor in execution upon the judgment; yet he might prosecute the suit to judgment, as well as if the debtor had remained in custody.

In order to see the correct application of these cases, we must consider what *charging* in execution is. It will be found to be a term which is not applied to the apprehension of a debtor for the first time on a *ca. sa.*, but always to the detention of a defendant who was originally arrested on *mesne* process, and is still at the time of suing out of the final process in actual custody.

If the debtor be on bail the process to take him again is a *ca. sa.*, delivered to the Sheriff for actual enforcement; or if to fix the bail merely, then with a direction to return it *non*

est inventus. The actual arrest in such a case is not a *charging* in execution, but a simple arrest.

Whenever the process is against a prisoner in actual confinement, whether at the suit of the same, or a different plaintiff, it is *charging* him in execution.

The charging a debtor in execution was therefore a continuation as it were of his former imprisonment: it was not a new arrest.

When a prisoner was charged in execution in the Queen's Bench Prison at the suit of the same plaintiff, a side-bar rule was issued to the Marshal to acknowledge the debtor in his custody; and upon this being done a *committitur* was drawn up and entered in the Marshal's books, and then filed with the Clerk of the Judgments.

If the defendant were not detained at the suit of the same plaintiff in the Queen's Bench Prison, a *habeas corpus ad satisfaciendum* was issued to bring the defendant into Court, in order to charge him in execution, and when he was brought up a rule issued remanding him to prison in execution for the debt.

The proceeding by *habeas corpus* was the process adopted in the Common Pleas and Exchequer, whether the prisoner was confined at the suit of the same or of a different plaintiff, and when the prisoner was in the custody of the Sheriff, a *ca. sa.* had to be sued out to such Sheriff, with directions to charge him in custody: *Tidd's Prac.* 9th ed., 363, 4; *Tidd's Forms*, adapted to 8th edition of the *Practice*, 126, 7.

The procedure in such cases is substantially the same at the present day, excepting a *habeas corpus* is not now required: *Arch. Prac.* 11th ed. 1198, 9. If therefore the charging in execution must be a continuation of and founded upon a former custody, that former custody must have been and must be a lawful one: if it be not, then a confinement founded upon it cannot be supported.

It is just like the case of a Sheriff having several writs of *capias* in his hands against the same defendant, in which case if he grant a warrant only on a void writ and

arrest upon it, he cannot detain the defendant by reason of the other lawful writs which he has in his hands: the original arrest being bad, vitiates everything which is founded upon it: *Hooper v. Lane* (10 Q. B., 546, affirmed in House of Lords, 3 Jur. N. S. 1026).

So in the cases in Barnes, 373, and 2 Wils. 294, there could not properly be a *charging* in execution, because in both cases it was held the defendants were not in legal custody upon which they could be charged.

I do not see why in the case in Wilson the plaintiff could not have assented to the debtor being still in custody at his suit, upon his voluntary return, just as it was held in *Jarvis v. Pierce*, before mentioned, that after a voluntary escape and return the plaintiff might still consider him as in custody at his suit, if he pleased, though he was not obliged to do so.

However, the question is whether the two cases I have just considered are any authority that a prisoner, who is allowed voluntarily by the Sheriff to escape from *mesne* process, can never afterwards be taken in that suit by a *capias ad satisfaciendum*, and I think they are no authority for that position. They may shew that if this defendant were now to be received by the Sheriff on a voluntary return, the plaintiff could not have the benefit of his *ca. sa.* simply by lodging it with the Sheriff, because such new imprisonment, being founded on the previous illegal detention, could not be a proper continuation of a legal imprisonment, which the law requires.

But why, as I have already remarked, the plaintiff might not admit the voluntary return of his debtor to have placed him again in lawful custody, and so proceed against him as if he had never been out of custody, I do not see, upon the authority before mentioned and the reason of the case.

In the case, then, of a return, after a voluntary escape, it may be that the law is, that a plaintiff cannot accept that return, and lawfully *charge* his debtor in execution by the mere delivery of the writ to the Sheriff; and it may be that if the debtor do not voluntarily return but remain at large, that a plaintiff, who

arrested his debtor by a *capias* at the commencement of the suit, cannot any longer, by reason of the legal continuation of imprisonment being broken, arrest his debtor on a *capias ad satisfaciendum* by force of the affidavit of debt on which the original arrest was grounded; but I see no reason why the plaintiff might not make a fresh affidavit of debt, just as if the defendant had not been before arrested in the suit, and sue out a *ca. sa.* upon it, and arrest his debtor as on a primary arrest.

This is a great deal of trouble, inconvenience, expense and delay to the plaintiff, and all occasioned by no act or default of his own; but, beside his remedy against the Sheriff, it shews that the plaintiff may still, if necessary, have a remedy against his debtor by a *ca. sa.*, and that he is not utterly without remedy, as was argued for him.

I think there is no doubt this defendant, when he was rendered by his bail after the *ca. sa.* had been returned *non est inventus*, was not a prisoner on final, but on *mesne* process: *Reynolds v. Simmonds* (7 Dowl. 85); *Crompton v. Ward* (1 Str. 429); *Jones v. Tye* (1 Dowl. 181); *Arch Pr.* 11 Edit. 595, 1200; *Green v. Foster* (2 Dowl. 191); *Thackray v. Harris* (1 B. & Al. 212); *Dorman v. Rawson* (Tayl. 265); *Jackson v. Cowper* (4 M. & W. 353).

If this Statute of Anne be held to be in force here, the plaintiff will be compelled to proceed against the defendant upon his recapture as promptly as he would have been obliged to do, notwithstanding the strong language of the Statute, that he is to be kept without bail or main-prize, just as if he had at the time of his retaking never have been out of custody: for "it was not the intent of the Statute to make escaping prisoners pay the debt right or wrong, or to be in gaol forever:" *Hothershell v. Bows* (6 Mod. 21); *Webb v. Thompson* (Str. 401).

As to remanding the defendant or detaining him in prison because of his escape, although the warrant under which he was taken be not a legal warrant, *Paine's Case* (11 Mod. 279 and 1 P. Wms. 439) is an authority; but it may have been

meant only that as he escaped from the Marshalsea, and when taken on the escape-warrant he was committed to Newgate, that he was not properly before the Court of King's Bench, not being in the Marshalsea, and therefore the Court would not set him at large until he was replaced properly with the Marshal again. This must have been so, because if he had been brought up on *habeas corpus* into the King's Bench, or into the prison of that Court, he must have been discharged, as his imprisonment was plainly illegal. See, also, *In re Andrew* (4 C. B. 226).

In this case the defendant is already in the prison of the Court as much as he ever can be: there is no other custody he can properly be transferred to: he is in the same custody as it is said he escaped from, and therefore we may deal with his case by motion and rule, without requiring or putting him to the expense and delay of a *habeas corpus*.

I have considered this case in every way in which it presented itself to me, and the conclusion to which I have come is that the Statute of Anne, under which the escape-warrant issued, is in force in this Province; that its being applicable to the special prisons of the Superior Courts of Law and Equity in England is sufficient reason for adopting it as applicable here to all our prisons, because we have no peculiar prisons attached to the Courts as there are in England; that because the Statute does not extend to *every* prison in England, is not a sufficient reason for declaring it shall not apply to *any* prison in this Province; that it is a Statute passed "in amendment of the law," and is not one of *mere local expediency*, but general in its nature and beneficial in its purpose.

The words "mere local expediency" require to be considered. What I understand by them is that they apply only to such a law which could not with the least propriety be transplanted to another country, or which is utterly inappropriate to it, and upon which it could find nothing to operate. I conceive those laws which might have been passed to meet an illegal combination of workmen or others in particular trades, or in certain specified districts, or to

suppress a particular riot or disturbance in certain counties or towns; or which related to copyholds, or gavelkinds, or particular customs, or to apprentices; or which prohibited the carrying on of trade in towns or cities by any other than those who had the freedom of these towns or cities; or prohibited the growth of, or regulated the making or manufacture of certain articles;—might fairly be called laws of *mere local expediency*; but that these words can be applied so as to exclude such a Statute I am now speaking of is not, in my opinion, a fair or reasonable construction of their natural meaning.

It cannot be said of this law, as was said by the Master of the Rolls in *Attorney General v. Stewart* (2 Meriv. 163), in speaking of the English Statute of Mortmain not being a part of the law of the Colony of Grenada, in which the law of England had been adopted: “But framed as the Mortmain Act is, I think it is quite inappropriate to Grenada, or any other colony. In its causes, its objects, its qualifications and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred as it stands into the code of any other country.” And I conceive it to be also necessary, in the due administration of justice, that a party wrongfully permitted by the Sheriff to go at large should not by his wrongful act prejudice a plaintiff in the due and effectual prosecution of his suit, and of all remedies for obtaining the fruits of his judgment; and that the remedy against the Sheriff which manifestly is not the only one, when the escape is from final process, should not be left as the only one, or the most convenient one for the creditor to pursue, when the escape is from *mesne* process, unless the law is plainly to the contrary.

I have considered this case with the more care, because it affects the liberty of the subject and touches the jurisdiction of this Court; and with every anxiety which one must feel in treating of such matters, and with every desire to deal as impartially with the case as if I had not myself made the

order which is impeached, the opinion I have formed is, and which I express with great distrust of its correctness, as I have the misfortune to differ from the learned Chief Justice and my brother Wilson, that the Statute is in force in this Province and the escape-warrant was lawfully granted.

J. WILSON, J., concurred with Richards, C. J.

*Rule absolute to discharge defendant
from custody of Sheriff.*

MCMILLAN V. JELLY.

Action of crim. con.—Condonation—New trial refused.

In an action of *crim. con.*, *Held*, that the fact of plaintiff having after verdict in his favour, from mere motives of compassion and consideration for their child, taken back his wife to live with him, was not such a condonation as would induce the Court to interfere on defendant's behalf by granting a new trial.

THIS was an action of *crim. con.* tried before *Morrison, J.*, at the last assizes, held at London.

The jury rendered a verdict in favour of the plaintiff for \$1000 damages.

E. Crombie, obtained a rule *nisi* to set aside the verdict and for a new trial, on the grounds, amongst others, that the damages were excessive, and that plaintiff had condoned the offence by taking back his wife.

The plaintiff made an affidavit admitting that in the middle of November last he had taken his wife back at her earnest and repeated solicitation, and on her promise of future good behaviour.

James Patterson and *J. B. Read*, shewed cause, citing *Wilford v. Berkeley*, 1 Burr. 609; *Wilton v. Webster*, 7 C. P. 198; *Farley v. Glassford*, 7 C. P. 285; *Street v. Dolsen*, 14 U. C. 537; *Hyde v. Gooderham*, 6 C. P. 21;

Gfroerer v. Hoffman, 15 U. C. 441; *Flint v. Bird*, 11 U. C. 444; *Duberley v. Gunning*, 4 T. R. 651.

Crombie, in support of the rule, contended that the action being for the loss of the society of the wife, the damages were excessive, for the plaintiff had taken her back and condoned the offence; that the whole aspect of the plaintiff's case was disreputable, and considering this and his circumstances in life the damages were excessive; that as the law is now administered in England, no proceedings would be entertained, if the husband had condoned the offence as in this case.

J. WILSON, J., delivered the judgment of the Court.

[After disposing of the other grounds taken in the rule, the learned Judge proceeded]:—We are asked to grant a new trial, because the damages are excessive. In *Edgell v. Francis* (1 M. & G. 222) *Tindall, C. J.*, said, “With respect to damages, the Court never interferes unless they are very excessive, or a strong case is made out that the jury have taken a perverted view of the matter.” In every case relating to this question, the same kind of language has been used; in *Foy v. London, Brighton, and S. Coast R.* (18 C. B. N. S. 225); *Sharp v. Brice* (2 W. Blac. 942); *Creed v. Fisher* (9 Exch. 472); *Robertson v. Meyers* (7 U. C. 415). In this case we are pressed with the consideration, that the jury gave damages on the assumption that this *crim. con.* had been the cause of the total separation of the plaintiff and his wife, when in fact it is admitted that he has condoned the offence, and they have become reconciled, and are living together as man and wife. In *Weedon v. Timbrell* (5 T. R. 375) it is laid down in express terms that the gist of this action is the loss of the comfort and society of the wife. In *Chambers v. Caulfield* (6 East, 244) the question of what this loss of society is, in case of voluntary separation under certain circumstances, is discussed, and there it is said, on the question of excessive damages, that if it appeared from the amount of the damages given, as compared with the facts of the case laid before the Jury, that they must have

acted under the influence of undue motives, or some gross error or misconception on the subject, the Court would have thought it their duty to submit the question to the consideration of a second jury, but that this did not appear to have been the case.

The case before us discloses, we think, circumstances discreditable to all concerned, and ought not on slight ground to be tried again and its disgusting details again repeated. As to their living together again, we can but say that if the plaintiff overlooked the course of his wife for the sake of her and their child, he has been more compassionate than most men would have been, and we are unable to say whether his living with her under the circumstances is not a greater infliction, than losing her society altogether. If it had been made to appear that he connived at his wife's degradation in any way, or that she was, with the plaintiff's knowledge, misconducting herself with the defendant, or if they had been living apart for the mere purpose of the trial, the whole aspect of the case would have been changed; but, as it is presented to us, the plaintiff has been weak enough, at the earnest entreaties of his erring wife, for the sake of their child, and in reference to a more innocent and happier period of their lives, to consent to take her back, on her solemn promise of future good behaviour, and we shall not deprive him of the solace of the damages the jury have awarded him.

The rule will be discharged.

Rule discharged.

MEMORANDA.

The following gentlemen were called to the Bar during this Term :—J. MAGEE, B. CRONYN, J. W. FLETCHER, A. H. MEYERS, HENRY BECHER, W. H. CUTTEN, J. E. ROSE, W. JOHNSON.

DIGEST

OF

CASES REPORTED IN VOL. XVII., TRINITY TERM, 31 VIC.
TO MICHAELMAS TERM, 31 VIC.

ABSCONDING DEBTORS ACT.

Action by Sheriff under 25th sec. of.]—See PLEADING, 5.

ACCORD.

See EQUITABLE PLEADINGS, 1.

ACTION.

Of Ejectment—right to bring, against all persons in possession, whether joint or several.]—See EJECTMENT, 5.

By Sheriff under Absconding Debtors Act.]—See PLEADING, 5.

Of Crim. Con.—Condonation.]—See NEW TRIAL REFUSED, 2.

See USE AND OCCUPATION.

ACTUAL NOTICE.

Evidence of, furnished by possession of means of.]—See HARBOUR CO.

ADJOURNMENT.

Under s. 11, sub-sec. 2, of Insolvent Act of 1864, is as of course.]—See INSOLVENCY, 1.

ADMISSIBILITY OF EVIDENCE.

See USURY.

ADMISSIONS AND DECLARATIONS.

Of prisoner, evidence against himself.]—See CRIMINAL LAW, 2.

ADOPTION.

By principal, of lease of agent unauthorized by deed.]—See LEASE, 1.

By Crown, of original survey of highway.]—See HIGHWAY, 2.

AGENT.

Fire insurance—Policy not under seal—Agent's power to bind Co. by

parol—Waiver of condition—Pleading.

One of the conditions of a fire policy, not under seal, issued to plaintiff by defendants, an Insurance Co., was, that no suit of any kind should be sustained in any Court against the Co. for the recovery of any claim, unless brought within six months after damage occurring to the insured. Within this time plaintiff presented his claim for loss, when it was agreed by parol between him and one D. acting for defendants, that if plaintiff would not prosecute his claim until S. returned from England, defendants would pay the same and take no advantage of the limitation clause above referred to. The insurance had been effected by and through D., and the premiums paid to him, or to S., who was associated with him in the management of the Co., and the policy signed by D. as "manager for the said Co. in Upper Canada," under an express authority from the directors, two of whom subscribed their names to the same, opposite a seal, with the name of the Co. upon it. It also appeared that after the expiration of the six months, there had been an actual tender of payment, though of a lesser sum than that claimed, by the agent of defendants to plaintiff: *Held*, that D. had power to bind the Co. as their agent, and that what had taken place between him and plaintiff amounted to a waiver in law of the six months' condition, and that the plaintiff was therefore entitled to recover.

Remarks upon the impropriety of Insurance Companies setting up defences of the kind indicated, instead of any *bonâ fide* reason that

may exist for resisting claims made against them.

Observations on the premature introduction into the declaration of the averment as to the six months' limitation of time, instead of leaving it to be pleaded by defendants.—*Brady v. The Western Insurance Co. (Limited)*, 597.

Execution of lease by, without authority under seal.—See **LEASE**, I.

AGREEMENT FOR PURCHASE OF LAND.

Provision for forfeiture on default—Evidence of election to forfeit—Extension of time for payment—Measure of damages.

Plaintiff, on the 20th January, 1866, agreed under seal with defendants to sell to them certain land for \$5000; \$2500 to be paid on 1st April, 1866, and \$2500 on 1st May, 1866, with interest, and to convey on these payments being made. Defendants covenanted to pay, and that if they made default "the agreement should be void and of no effect, and all moneys paid thereunder up to the time of such default should be forfeited to the plaintiff," and that time should be of the essence of the contract. To an action on this covenant, alleging non-payment by defendants, and their neglect to complete the purchase, defendants pleaded, on equitable grounds, that defendants went into possession and paid \$1000, but having made default in a further payment, the plaintiff evicted and kept them out of possession, and elected to treat the agreement as forfeited, whereby the covenant became void.

At the trial it appeared that the

whole purchase money was \$6000, of which \$1000 were paid down, and \$1000 more on the 7th April, 1866, when, by an endorsement under seal on the agreement, the plaintiff extended the time for payment of the balance to 20th May, 1866. Defendants had taken possession under a previous lease, in May, 1865, and expended about \$4000 in boring for oil, and had a steam engine on the premises. They were not interfered with until about the 25th of May, when they were about to move this engine, which the plaintiff refused to allow, saying that they had forfeited the land, having failed to make their payments, and that the property was his and they were trespassers. He brought several men with him, who threatened defendants with violence if they attempted to cross the fence into the premises, and he nailed up the engine house, refusing to let defendants enter it. The plaintiff gave evidence tending to shew that his object in this was to obtain payment. The jury having found for defendants upon the plea—

Held, 1. That under the agreement defendants were not entitled to rescind on forfeiture of the moneys paid, but that the option was with the plaintiff.

2. That there was evidence to go to the jury that the plaintiff had elected to forfeit the agreement as alleged; and the verdict was upheld.

3. That the endorsement extending the time for payment did not do away with the provision for forfeiture, but incorporated the extended time in the agreement as if originally there.

4. *Seemle*, that on a contract to

purchase land the measure of damages is the same whether it be under seal or by parol, and that the plaintiffs here could have recovered only damages for the loss of his bargain, not the full purchase money according to the contract.—*Marcus v. Smith and Ray*, 416.

AGREEMENT FOR SALE OF MORTGAGE.

Not necessary to be in writing.—*See MONEY HAD AND RECEIVED.*

ALTERATIONS.

In will.—*See EJECTMENT*, 1.

AMBIGUITY.

In affidavit on which perjury ascribed.—*See CRIMINAL LAW*, 3.

AMENDMENT.

Ejectment—Bona fides of notice limiting defence—C. S. U. C. ch. 27, sec. 12—Practice.

In an action of ejectment defendant appeared and filed a notice claiming title, to the possession of the land “mentioned and described in the writ of ejectment summons herein,” and after service of issue book and notice of trial, and within four days after appearance, served a notice limiting her defence to all the property mentioned in the writ except a strip on one side thereof, describing it by metes and bounds, two chains in length by *one link* in width. It being too late to serve a fresh notice of trial, plaintiff applied for and obtained a Judge’s order to

amend the issue book without prejudice to the notice of trial, by adding the usual statement as to a limited defence. Plaintiff went on and took a verdict, though warned by defendant that the Court would be moved to set the order aside. On motion to set aside this order and all subsequent proceedings,

Held, as it was shewn that there was no question of boundary between the parties, and the notice limiting the defence could not be *bonâ fide*, that after expressly claiming title to the whole of the premises in the notice required by sec. 8 of the Ejectment Act, the Court would not set aside the order of the Judge amending the issue book, as the effect of the amendment was to permit her to set up her defence if it was *bonâ fide*, and if it was not in good faith the Court would not assist her.

The Court declined to decide whether a Judge has power to amend, as was done in this case, where a *bonâ fide* notice limiting the defence is regularly served after notice of trial.—*Vrooman v. Vrooman*, 523.

Of notice of title refused.—See EJECTMENT, 1.

Of notice of title at nisi prius allowed.—See EJECTMENT, 9.

Of record in ejectment, by Court in banc, after verdict and exception taken.—See EJECTMENT, 2.

Of fi. fa. lands, even after sale, cures defect of variance between it and judgment—See EJECTMENT, 4.
—ASSAULT AND BATTERY.

APPEARANCE.

Causing to be entered without authority.—See PLEADING, 6.

Effect of, without notice of title, in ejectment.—See EJECTMENT, 8.

ARREST ON MESNE PROCESS.

See ESCAPE WARRANT.

ASSAULT.

By Conductor of Railway Co.—Liability of Co.—See RAILWAYS AND RAILWAY COS.

ASSAULT AND BATTERY.

Excess—Amendment.

Held, following *Davis v. Lennon*, S U. C. 599, that if more force and violence be used than necessary to expel a party from a house, after he has been requested and refused to leave, the excess must be replied; but if a plaintiff relies on the fact that he was assaulted and beaten not for the purpose of expelling him from the house, on his refusal to leave, as pleaded by defendant, then it is proper to take issue on defendant's plea, the *bona fides* of which becomes thenceforth the subject of enquiry.

Per *A. Wilson, J.*, that though the defendant's plea be disproved, as to the motive with which he assaulted plaintiff, the latter cannot, nevertheless, under a mere joinder of issue on defendant's plea, recover, if the defendant did no more than he had the right to do to effect the removal; for the motive, intent, and purpose with and for which the assault took place are not in issue, so long as he had the cause of justification, in fact, for what he did.

Quære, whether a plaintiff can new-assign that the acts complained of were committed by defendant for other causes and purposes than those set forth and justified by the plea.

Semble, that the replication of excess may be added, by way of amendment, at the trial; and if so, by the Court, even after judgment in the cause.

In an action for assault and battery plaintiff was allowed at the trial to amend his declaration, by adding that he thereby "became and was and is permanently injured:" *Held*, that the amendment had been properly allowed.—*Glass v. O'Grady*, 233.

ASSETS QUANDO.

See *SETTING ASIDE PROCEEDINGS*.

ASSIGNEE.

Proceedings in name of, in Chancery, where claim in Insolvency disputed.—See *INSOLVENCY*, 1.

Right to select legal adviser.—*Ib.*

ASSIGNMENT.

Of rent by landlord.—See *DISTRESS*, 1.

Voluntary assignment by insolvent resident in U. C. to assignee in L. C.—See *INSOLVENCY*, 2.

ATTACHMENT.

Absence of averment in declaration of service of notice of, upon defendant.—See *PLEADING*, 5.

Priority of Execution to.—See *INSOLVENCY*, 3.

ATTORNMMENT.

Evidence of.—See *USE AND OCCUPATION*.

AWARDS.

In applications touching, the particular materials moved upon to be specified in rule.—See *ESCAPE WARRANT*.

Suing upon award will estop party from denying authority of arbitrators.—See *WAIVER*.

BAIL.

See *ESCAPE WARRANT*.

BANKS.

Interest—*Con. Stats. C. ch. 58, sec. 9—29 and 30 Vic. ch. 10, sec. 5.*

Held, affirming the judgment of the Court of Common Pleas (*ante* p. 214) *Draper, C. J., VanKoughnet, C., and Mowat, V. C., dissentientibus*, that the 29 and 30 Vic. ch. 10, sec 5, exempts Banking corporations not merely from liability to the pecuniary penalty imposed by *Con. Stat. C. ch. 58, sec. 9*, but from the loss or forfeiture under that Statute of the security received by them for the moneys advanced.—*The Commercial Bank of Canada v. Cotton et al.*, 447.

See *PLEADING*, 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Pro. note payable in Lower Canada—*Non-presentment for nearly five years after maturity*—*Liability of maker*—*Waiver by endorser of presentment*—*Evidence*.

The law of Lower Canada is the same as the law here and the law of England, that, as between the holder and the endorsers of a promissory note, the note must be presented for payment, so as to bind them, on the day the Statute makes it payable, and at the place where it is payable; but, as between the holder and the maker, it is enough to present it at any time within the period fixed by the Statute of Limitations, and before action brought.

In this case, which was between holder and maker, the note was made in Upper Canada, payable at the Bank of Montreal, in Montreal, and was not presented until five years after maturity, though before action brought:

Held, affirming the judgment of the County Court, that the note had been well presented.

Immediately before the note fell due the payee and first endorser wrote to plaintiff requesting him to waive protest, and agreeing to hold himself liable just as if the note had been presented for payment: *Held*, that though good as against the endorser, it was no evidence as against the maker, to preclude him from setting up that the note had not been presented for payment.—*McLellan v. McLellan*, 109.

BILL OF SALE.

Not a marriage contract within C. S. U. C. ch. 73, sec. 1.]—See MARRIED WOMAN'S ACT.

BOND.

"To execute a good and sufficient deed in law," construction of.]—See PLEADING, 4.

BOOKS OF ACCOUNT.

Neglect by insolvent to keep, no ground for refusing discharge, when.]—See INSOLVENCY, 4.

BREACH OF PROMISE OF MARRIAGE.

Deceit—Presumption of innocence—Nonsuit—Scintilla of evidence.

The declaration contained four counts; the first, for breach of promise of marriage, alleging that defendant was an unmarried man, and that the promise was to marry the plaintiff within a reasonable time.

The second count was for deceit, alleging that the defendant was an unmarried man, and that he falsely, &c., pretended to plaintiff that he was desirous of marrying her, and thereby persuaded her to go with him to T., for the purpose of having a legal marriage celebrated between them; and falsely, &c., persuaded her to enter into a pretended marriage; and falsely, &c., pretended to plaintiff that the said marriage was a lawful marriage, and thereby persuaded plaintiff to cohabit with him as his wife.

Third count, that the defendant falsely, &c., pretended to plaintiff that he was an unmarried man; and falsely, &c., pretended that he was desirous of marrying her, and by false pretences caused plaintiff to submit to a pretended marriage with him; and falsely, &c., persuaded her that the pretended marriage was a lawful marriage, and thereby induced her to cohabit with him.

The fourth count was for an assault.

At the trial evidence was given of attentions to plaintiff on the part of defendant, and of letters written to her by him ; but it appeared that at the time defendant was a married man, and that plaintiff was aware of the fact. It was also proved that defendant had said he would persuade plaintiff that he was divorced, and take her away, to spite her children ; and that plaintiff had said she would have nothing to do with him till he was free. Defendant was never divorced, and his wife was still living at the time of the trial. Defendant and plaintiff subsequently went to a hotel in W., calling themselves man and wife, and afterwards took a house there, still passing as man and wife, and resided there for a short time. There was no positive evidence of any marriage ceremony :

Held, on motion to enter a nonsuit, pursuant to leave reserved, (*dissentiente Adam Wilson, J.*) that there was no evidence to go to the jury on any of the counts.

2nd. That the presumption of innocence, that the defendant had not been guilty of a conspiracy, was an answer to any presumption of a marriage ceremony to be drawn from the cohabitation proved.

3rd. That on motion to enter a nonsuit, pursuant to leave reserved at the trial, the Court will not consider whether there is a *scintilla* of evidence, but will make the rule absolute, where they would have set the verdict aside, if the motion had been to set it aside as against evidence.—*Wright v. Skinner*, 317.

BY-LAW.

See PLEADING, 1.

CASE.

Proper remedy for disturbance of right to pews.—See EJECTMENT, 2.

CA. SA.

Practice as to issuing, after voluntary escape from Sheriff on mesne process.—See ESCAPE WARRANT.

CERTIFICATE.

Upon deed by married woman, requisites of.—See DEED BY MARRIED WOMAN.

Containing substantially all the requisites under 1 Wm. IV. ch. 2, is evidence of married woman's examination.—*Ib.*

CHAMPERTY.

See EJECTMENT, 7.

CHARGING IN EXECUTION.

Meaning of.—See ESCAPE WARRANT.

CHATTELS.

Contemporaneous delivery of, with lease of lands, under mem. annexed to lease merely allowing use of chattels.—See LEASE, 2.

CHATTEL MORTGAGE.

Validity, where made to Bank, though not filed.—See SALE OF GOODS.

CHURCH TEMPORALITIES ACT.

See EJECTMENT, 2.

CIRCUITY OF ACTION.

Circuity of action—Pleading.

It is not necessary to plead a special plea of circuity of action: whenever this appears by the record it is an answer to the action.

In this case the declaration stated that plaintiff agreed to sell, and defendant agreed to buy from plaintiff certain land, which was at the time encumbered, \$1000 of the purchase money to be paid down for the purpose of paying off the incumbrances, under a penalty of \$300 to either, to be paid on 19th September following, in case he did not carry out the bargain. Plaintiff then averred his willingness, readiness, and ability to complete the sale, and, on payment of the \$1000, to pay off the incumbrances and make a good title to defendant, and also his execution of a deed to defendant before said 19th of September, ready to be delivered to defendant on his paying the \$1000, to be applied as aforesaid, &c.; yet defendant did not accept the conveyance or pay the \$1000, and plaintiff claimed the \$300 as liquidated damages.

Defendant pleaded that plaintiff had not at the time of the alleged breach, or at any time before the commencement of this suit, a good title to the land, and was not able to convey the same as agreed, and the issue joined on this plea was found for defendant:

Held, that as plaintiff had not begun his suit till after the time for payment of the money by defendant, and had not title, it thus appeared he was as much in default at the commencement of the suit as defendant, and as the damages

would be the same against both parties, the defence was a good answer, in avoidance of circuity of action, and a rule to enter judgment for plaintiff *non obstante veredicto* was therefore discharged.—*Koster v. Holden*, 650.

Effect of absence of plea of.]—
See EVIDENCE, 2.

COMMISSIONER OF CROWN LANDS

*Has no authority to open roads on lands granted by the Crown.]—*See HIGHWAY, 1.

COMMISSIONERS FOR TAKING AFFIDAVITS.

23 Vic. ch. 2, s. 28, *merely empowers to take affidavits thereunder in the place in which they act as such.]—*See CRIMINAL LAW, 3.

COMMON COUNTS.

See MONEY HAD AND RECEIVED.

COMPOUNDING PENAL ACTION.

See CRIMINAL LAW, 5.

CONDITION.

*In policy, parol waiver of.]—*See AGENT.

CONDONATION.

*In action of crim. con.]—*See NEW TRIAL REFUSED, 2.

CONDUCTOR.

Liability of Railway Company for assault of.]—See RAILWAYS AND RAILWAY Co's.

CONVERSION.

By co-partner of joint property.]—See PLEADING, 5.

Of goods.]—See EVIDENCE, 3.

CONTEMPT.

In proceedings to bring into, the particular materials moved upon to be specified.]—See ESCAPE WARRANT,

CONVEYANCE.

Of pews.]—See EJECTMENT, 2.

In fee, evidence of.]—See EVIDENCE, 1.

By Sheriff out of office.]—See EJECTMENT, 7.

See DEED BY MARRIED WOMAN.—DOWER.—EASEMENTS.

COSTS.

Trial by proviso—Discontinuance—Failure to pay costs—Nonsuit—Practice.

The tenants in an action of dower having given notice of trial by proviso, the demandant took out and served a rule to discontinue on payment of costs, with a consent on her part that if the costs were not paid within four days, the tenant might sign judgment of *non pros.*

The costs not having been paid, the tenants entered the record for trial, nonsuited the demandant, at her own election, and entered the usual judgment for the costs antecedent to and attending the nonsuit:

Held, that the service of the rule to discontinue being no stay of proceedings unless the costs taxed under it were paid, the tenants were entitled to the costs of the non-suit, and were not obliged to have taken a judgment of *non pros.* under the terms of that rule.

The Master, on revision, having disallowed these costs, as unnecessarily incurred, *held*, that he had exceeded his discretion; the general rule being that the Court awards, the Master fixes the amount of the costs of suit.

Semble, on the authority of *Baker v. Jupp*, 3 D. & L. 474, that issue having been joined, there could not properly have been a judgment of *non pros.*

Per A. Wilson, J. (doubting as to the right of the tenants to have proceeded to non-suit, instead of availing themselves of the proceeding by *non pros.*) that the demandant having been a party to all that occurred, by appearing and accepting a nonsuit, could not afterwards be allowed to object to its regularity.—*Miller v. The Corporation of the City of Hamilton*, 514.

See PLEADING, 6.

COVENANT TO STAND SEISED.

See EJECTMENT, 7.

CRIM. CON.

Effect of receiving back wife.]—See NEW TRIAL REFUSED, 2.

CRIMINAL LAW.

Mutiny Act—Consol. Stat. C. ch. 100.

1. *Held, per J. Wilson, J.*, that the Imperial Mutiny Act does not override the Consol. Stat. C., ch. 100, but that the latter was passed in aid of it, and is therefore in force. *Per A. Wilson, J.*, that the punishment by fine and imprisonment, imposed by the Provincial Act, stands abolished as long as the Mutiny Act is in force, and that the imprisonment can in no case exceed six calendar months; but that the power of trial by the Court of Oyer and Terminer, under the Provincial Act, has not been taken away by the Mutiny Act; and therefore that the defendant in this case could not complain, as he had been tried by a tribunal of this kind, and sentenced to no longer imprisonment than the last mentioned period; and that, though a fine of 10s. had also been imposed, for this was merely nominal, in compliance with the Provincial Statute, and would not entitle him to be discharged, as the Court had power to pass the proper judgment, if an improper one had been given.—*Regina v. Sherman*, 166.

2. *Conviction under Consol. Stat. U. C. ch. 98—New trial refused—Admissions and declarations of prisoner—Evidence of intent, and of being in arms with intent, to levy war—Import of the expression “in arms,” under Con. Stat. U. C., ch. 98—Imp. Act 11 & 12 Vic., ch. 12—Duty of Court as to evidence on application for new trials in criminal cases—Surprise—New trials, when inexpedient to grant rules nisi for.*

The prisoner, having been indicted under Consol. Stat. U. C., ch.

98, (3 Vic. ch. 12), as a citizen of the United States of America, was convicted of having, as such, joined himself to divers other evil disposed persons, and having been unlawfully and feloniously in arms against the Queen within Upper Canada, with intent to levy war against her Majesty. It was sworn that the prisoner had said he was an American citizen and had been in the American army, and there was no evidence offered to contradict this:

Held, evidence against the prisoner, as his own admissions and declarations, of the country to which he belonged.

It was proved that several hundreds of armed men landed in this Province from the United States of America; that very shortly afterwards the prisoner came from the same place; that he was with them all the night previous to an attack made by them on the Canadian volunteers, and was early in the morning of that attack seen carrying a rifle and bayonet similar to those carried by the invaders, and altogether different from those used by her Majesty's troops. It was also shewn that this armed body was organized; that it encamped and marched in military order; that it took prisoners, engaged her Majesty's troops, and killed several of them:

Held, evidence of an intent, on the part of the prisoner, to levy war against her Majesty the Queen.

This intent, as laid down in *Frost's Case*, 9 C. & P. 150, may be collected from the acts of the accused, and does not require the passing of a resolution, or a verbal or written declaration, plainly expressive of a purpose to levy war.

It was further proved that the prisoner was in arms at Fort Erie, in Upper Canada, at four o'clock of the morning of the attack made upon the volunteers, and that he had been there with the armed enemy the night before: *Held*, evidence that he was in arms in Upper Canada with intent to levy war, notwithstanding his statement that he had found the weapons with which he was armed upon the road, and the fact that there was evidence of his having been unarmed the night before.

It is not necessary, in order to render a party amenable to the Statute, that he should actually have arms on his person: it is quite sufficient that he is present and concerned with those who are armed, even though he do not carry arms himself.

Whenever a joint participation in an enterprise is shewn, any act done in furtherance of the common design is evidence against all who were at any time concerned in it. In this case evidence was admitted against the prisoner of the engagement above alluded to, although the same took place several hours after his arrest:

Held, that the evidence had been properly received, as shewing to some extent that the engagement in question had been contemplated by the parties while prisoner was with them before his arrest.

The Imperial Statute, 11 & 12 Vic., ch. 12, does not override 3 Vic., ch. 12, of this Province, for the latter is re-enacted by the consolidation of the Statutes, which took place in 1859.

As has been laid down in several previous cases, it is not the duty of the Court, under the Statute respect-

ing new trials in criminal cases, to scan the evidence with a view to saying whether the jury might, or might not, fairly considering it, have acquitted the prisoner: it is sufficient for the Court to say that there was evidence to warrant a conviction.

It is no ground of surprise that a prisoner "had no knowledge of the evidence to be produced against him;" for no one is obliged, by pleading or otherwise, to disclose the evidence by which his case is to be supported: it is sufficient that the party is fully apprised of the case or charge proposed to be proved against him, which he must, being so informed, prepare himself to repel.

Regina v. Finkle, 15 C. P. 453, followed as to the inexpediency of granting rules *nisi* for new trials in criminal cases, where there is no probability of their being made absolute.—*Regina v. William Slavin*, 205.

3. *Conviction for perjury—Ambiguity in affidavit—Absence of venue in jurat—Presumption as to place where affidavit sworn—Evidence—23 Vic. ch. 2, sec. 28.*

A joint affidavit made by the defendant and one D. stated * * * "Each for himself maketh oath and saith, that, &c.; and that he, this deponent, is not aware of any adverse claim to or occupation of said lot. The defendant having been convicted of perjury on this latter allegation, *Held*, that there was neither ambiguity nor doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot.

To sustain a conviction for per-

jury it is not necessary that the jurat of the affidavit, upon which the perjury is assigned, should contain the place at which the affidavit was sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material.

In the affidavit in question here there was no statement as to where it had been sworn, either in the jurat or elsewhere, except the marginal venue, "Canada, County of Grey, to wit:" but the contents shewed that it related to lands in the County of Grey, and it was proved that defendant subscribed the affidavit; that the party before whom it purported to have been sworn, was a Justice of the Peace for that county, and had resided there for some years; that the affidavit had been received through the post office by the agent of the Crown Lands there, by whom it was forwarded to the Commissioner of Crown Lands, and that subsequently a patent for the lot issued to the party on whose behalf the affidavit had been made: *Held*, evidence from which it was to be inferred that the affidavit was sworn in the County of Grey, and that the jury had properly so inferred.

Held, also, that if the affidavit was sworn in the County of Grey, the proof of the swearing by the Justice of the Peace, and the taking of the oath by the defendant, were made out by proving their signatures.

The provision of the 23 Vic. ch. 2, sec. 28, that all affidavits required thereunder may be taken before "any Justice of the Peace" does not empower a Justice of the Peace, to administer the oath anywhere in the

Province: it merely authorizes him to do so in the place in which he acts as such Justice.

The same interpretation of the Act applies to Commissioners for taking affidavits mentioned therein.—*Regina v. Atkinson*, 295.

4. Conviction for perjury—Evidence.

C. S. U. C. cap. 52, sec. 73, empowers any Justice of the Peace to examine on oath any person who comes before him to give evidence touching loss by fire, in which a Mutual Insurance Company is interested, and to administer to him the requisite oath.

The defendant was convicted on an indictment for perjury assigned upon a clause in his affidavit made in compliance with one of the conditions of a policy issued to him by a Mutual Fire Insurance Company, requiring the assured in case of loss by fire, to deliver into the Company a detailed statement under oath of his loss and value of the property destroyed. The policy of insurance containing this condition not having been produced, *Held*, that although the defendant's affidavit referred to the policy in such a way that its existence might have been fairly inferred, yet the conviction was bad, in consequence of the non-production of the policy, which would have shewn the authority of the Justice of the Peace, before whom the affidavit was made, to administer the oath, and also the condition above referred to, of which there had been no proof whatever, although the perjury assigned had been committed in complying with it.—*Regina v. Gagan*, 530.

5. Compounding penal action—29

& 30 Vic. ch. 51, sec. 254—18 Eliz. ch. 5. sec. 4.

The defendant was indicted for compounding a penal prosecution instituted by him against one F. under 29 & 30 Vic. ch. 51. sec. 256. It appeared that F. had been convicted under that Act, on the information of defendant, by the Police Magistrate of H., and a fine of \$50 imposed upon him, and that, on an appeal therefrom, defendant for \$10 agreed with F. not to prosecute this appeal, but consented that the conviction should be quashed, which was accordingly done :

Held, that the indictment would neither lie at common law, nor, on the authority of *Rex v. Crisp*, 1 B. & Al. 282, under the 18th Eliz., ch. 5, sec 4, and the conviction of the defendant was, therefore, ordered to be annulled.—*Regina v. Mason*, 534.

6. *Indictment for perjury—Sufficiency of.*

An indictment for perjury charged that it was committed on the trial of an indictment against A. B., at the Court of Quarter Sessions for the County of B., on the 11th June, 1867, on a charge of larceny : *Held*, sufficient, and that it was not necessary to specify the property stolen, the ownership thereof, or the locality from which it was taken ; nor to allege that the indictment was in the name of the Queen, as the Court must take judicial notice of the fact that her Majesty alone could prosecute on a charge of larceny.—*Regina v. Macdonald*, 635.

CROPS.

Raised by vendee of land fraudu-

lently conveyed by vendor, protected against execution creditor.]

See FRAUDULENT CONVEYANCE.

CROWN GRANT.

Navigable water—Right of Crown to lay out highway—Its right to grant portion of lake not navigable.

A grant of land will carry land covered with water.

The evidence shewed that the portion of the grant in dispute, at extraordinary periods, when the water of the lake was pressed up at this particular part of it by strong winds, admitted of scows passing over it, but that the water was not then more than four or five feet deep, and that at ordinary times it was quite shallow and fordable : *Held*, not navigable water.

The property in question formed part of the lake, though not navigable : the Crown surveyed a part for the line of road, which was then under water, the effect of which was that the property in question, which lay to the north of this intended road, would, if the road were made, become a mere stagnant pond :

Held, that the Crown had the right to lay out the highway where it did, and that therefore it could grant the portion to the north of it, which would be thus excluded from the lake ; and that it could do this without the aid of 23 Vic. ch. 2, sec. 35.—*Ross v. the Corporation of the Village of Portsmouth*, 195.

Invalidity of, where it involved an alteration of an original survey for a public highway, which had been adopted by the Crown.]

See HIGHWAY, 2.

See HIGHWAY, 3.

DAMAGES.

Excessive].—See TROVER.

Remote].—See RAILWAYS AND RAILWAY COMPANIES.

Measure of].—See AGREEMENT FOR PURCHASE OF LAND.

See TROVER.

See HARBOUR COMPANY.

DEBT.

Maintainable by assignee of rent].—See DISTRESS.

DEBT AND DAMAGES.

Discrepancies between, mere defects in form, and amendable].—See SETTING ASIDE PROCEEDINGS.

DECEIT.

In inducing plaintiff to enter into pretended marriage].—See BREACH OF PROMISE OF MARRIAGE.

DEED.

Upwards of 30 years old].—See DEED BY MARRIED WOMAN.

Made six years after Sheriff's sale].—See EJECTMENT, 1.

In fee, evidence of].—See EVIDENCE, 1.

Plea of execution of, to declaration on bond to execute a good and sufficient deed in law, bad].—See PLEADING, 4.

DEED BY MARRIED WOMAN.

1 Wm. IV. ch. 2—*Certificate—Evidence—C. S. C. ch. 85, sec. 11—Joint execution by husband and wife—Deed upwards of thirty years old—Possession—Presumption of law—Public officers.*

The Statute 1 Wm. IV. ch. 2, did not require that the place of execution of a deed by a married woman should be mentioned in the certificate to be endorsed thereon, but merely the place of her appearance before the Justices for examination; and this place is sufficiently indicated by the marginal venue in the certificate, as, for instance, "Province of Upper Canada, *Eastern District*, to wit;" and the words "then and there" refer to the margin.

It appeared from the deed, in this case, that it was dated 20th of October, and from the certificate that it was dated 17th of November following:

Held, on objection that the examination did not take place on the day of the execution of the deed, as required by the above Act, that this defect, if it really existed, was cured by 22 Vic. ch. 35, sec. 2.

Held, also, that the Act in question did not require the deed to be executed by husband and wife jointly in the presence of the Justices, but only that it should be executed by her jointly with her husband, and that she should execute it in their presence.

Burns v. McAdam, 24 U. C. R. 451, referred to as defining the meaning of joint execution.

The Statute provided that the certificate might be in some form of words to the effect prescribed thereby. In this case the words

of the certificate were, "Being separately and duly examined by us, consented thereto (referring to the execution of the deed); and it appears to us that such consent was free and voluntary, and not the effect of coercion, or the fear of coercion, on the part of her husband, or any other person:"

Held, synonymous with, "being examined apart from her husband, did appear to give her consent to depart with her estate, freely and voluntarily, and without any coercion on the part of her husband," &c.

Held, also, that the certificate in question, as remedied by C. S. U. C. ch. 85, sec. 11, containing in substance all that the Statute under which it was given required, was evidence of the fact of examination, &c., in accordance with *Jackson v. Robertson*, 4 C. P. 272.

Defendant produced a deed, upwards of thirty-one years old, with such certificate thereon, from plaintiff and her husband to the devisor of defendant's wife, and it was admitted that defendant and those under whom he claimed had been in possession during all this period:

Held, following *Orser v. Vernon*, 14 C. P. 573, that the deed, with the certificate upon it, coming from the proper custody, proved itself; and that from the fact that the possession of the land had gone in accordance with it for more than thirty-one years, it would be presumed that the deed as produced had been properly executed, and that every thing done by the Justices, as public officers, had been rightly done until the contrary was shewn.—*Monk v. Farlinger*, 41.

DELEGATION OF POWER.

See EJECTMENT, 8.

DELIVERY.

Agreement for, at future time, of goods sold, does not prevent property passing.—See SALE OF GOODS.

DEMISE.

See WAIVER.

DEVISE TO SELL FOR PAYMENT OF DEBTS.

Purchaser for value not bound to enquire as to debts.—See EJECTMENT, 8.

DISCHARGE.

Refusal of to insolvent, not warranted by his neglect to keep proper books of account, when.—See INSOLVENCY, 4.

DISCONTINUANCE.

Failure of plaintiff's to pay costs, under rule to discontinue, entitles defendants to proceed under notice of trial by proviso and to costs.—See COSTS.

DISTRESS.

1. *Illegal distress for rent*—2 W. & M., ses. 1, ch. 5, s. 5—*Assignment of rent*—*Distress by assignee*—4 Geo. II., ch. 28, s. 5—4 Anne, ch. 16, ss. 9, 10.

The action for double value, under 2 W. & M., sess. 1, ch. 5, s. 5, for illegal distress for rent, is not confined to the landlord only, but extends to those who distrain on his behalf, or in his name or right.

A landlord may assign rent, and since the Statute 4 Geo. II., ch. 28,

s. 5, rent-seck may be distrained for, and by one who has not the reversion, as, for instance, the assignee of the landlord.

In this case, one of the defendants assigned certain rent to a co-defendant, who gave the tenant (plaintiff) notice :

Held, that such an assignment conferred an estate, and that under 4 Anne, ch. 16, ss. 9, 10, the assignee was entitled to distrain for the rent in question, whether the tenant attorned or not.

Semble, that debt might have been maintained by the assignee for the rent.—*Hope v. White et al.*, 52.

2. *Similarity of counts in declaration—Election—Trespass—Wrongful continuance in possession—Distress for rent—Time of sale—Misdirection.*

The declaration contained three counts ; the first, trespass for breaking and entering plaintiff's store and taking his goods ; second, trespass to plaintiff's cattle, goods, &c., ; third, case for distraining on plaintiff's premises, for rent due defendant by plaintiff's immediate landlord, goods of much greater value than the amount of the rent, &c.:

Held, that plaintiff was not bound to elect at the trial upon which count he would go to the jury, although the three counts were founded on one and the same wrong.

Held, also, that the plaintiff was entitled to maintain trespass for a wrongful *continuance* in possession beyond the time he was reasonably authorized to keep the same.

In the case of distress for rent there must be five clear days between the day of distress and the sale, at the expiration of which time the landlord is *at liberty* to proceed

and sell ; but he is not *obliged* to sell and proceed with the sale, nor is he bound to begin to dispose of the distress on the sixth day, but has a reasonable time after the five days so to do ; and what is a reasonable time is a question for the jury, under all the facts of the case. In this case, therefore, the Judge having directed the jury that the landlord was bound to proceed to sell on the sixth day, *held*, that the direction was improper, and that the right direction would have been, after having told the jury the time when the goods could first have been sold, for them to find whether under all the facts disclosed the defendant had remained an unreasonable time in possession after the expiration of the five days before selling the goods.—*Lynch v. Bickle*, 549.

DOWER.

Dower—Sale of husband's estate by Sheriff—Conveyance by husband and wife—24 Vic. ch. 40, sec. 19—Right of demandant to recover.

After recovery in ejectment against the husband by the purchaser at Sheriff's sale of the husband's estate in the land in question, but before judgment entered, and while the husband was in actual possession, his wife joined with him in a conveyance in fee of the land, by way of bargain and sale, to a third party, thereby releasing to the latter, for the consideration of five shillings, her dower, and all right and title thereto, and all manner of actions, &c., of dower. No money consideration passed, the grantee executing a mortgage back for the whole of the purchase money mentioned in the deed to him, and the

husband remaining in possession until dispossessed by the Sheriff under process in the ejectment suit. The defendants, the tenants of the land, claimed under the purchaser at Sheriff's sale :

Held, that the demandant was entitled to her dower in the land in question ; for that the husband not having at the time the estate he professed to grant, nothing passed by his deed, and the release of the wife, as incident to, fell with it, as there was nothing upon which it could attach ; and that it must be implied that the release of dower referred to by 24 Vic. ch. 40, s. 19, must, to be binding on the wife, be contained in a deed made for the principal purpose of the husband conveying his interest to a purchaser, and in which the wife joins merely for the purpose of releasing dower, by way of extinguishment, in the land, and does not apply where the release is made to a stranger, when the husband had no estate in the land, and the dower or right thereto was solely dependent on that estate, and was not intended to be the subject of the conveyance ; that though the bargainee acquired an estate as against the husband, and perhaps against the wife also, by estoppel, the defendants being no parties to the deed, but claiming adversely to it, could not therefore by this deed conclude the demandant from saying she had not released her dower to a purchaser.

Quære, whether husband and wife can at law convey the right of dower as a distinct subject of bargain and property ; or whether she herself can do so after his death and before the assignment of it. If so, *semble*, that the remedy should be pursued by the assignee

in his own name.—*Miller v. Wiley et al.* 368.

Evidence of seisin—See SEISIN.

DUPLICITY.

See REPLEVIN.

EASEMENTS.

Statutory conveyance—*Easements*
—*Implied grant*.

One J. S., being owner of the east-half of one, and the west-half of an adjoining lot, by deed, expressed to be in pursuance of the Act respecting Short Forms of Conveyances, conveyed to G. S. in fee, the west-half, without express mention of any rights, easements, &c. At the time of the conveyance there were on the west-half a saw-mill and factory, which then and for some years prior, during unity of title to both lots, were driven by the waters of a river, which was dammed back, to form a pond on both lots, by a dam and embankment extending on to both. At the time of conveyance, also, there was on the west-half a building intended for a grist-mill, ready for the reception of machinery, and the embankment of the mill-pond was partly cut through to carry the water therefrom to another pond partly begun, from which the grist-mill was to be supplied. After the conveyance G. S. cut through the embankment at the place where the cutting had been begun, carried the water required from one pond to the other by a flume, and thus worked the grist-mill, which he had completed, and which could not otherwise have been worked. By this he diverted the water from the first pond and

from the east-half to a greater extent than it had been diverted before the conveyance. Such diversion and working of the mill were with the *parol* license of G. S. The cutting, flume, and grist-mill-pond were all on the west-half, and the water was returned from the mill to the river below the east-half:

Held, that, apart from any question of implied grant, by necessity, as the Act referred to included all easements, &c., used or enjoyed with the lands granted, there was an express grant of the right or easement to maintain the dam and to enter for purposes of repair on the east-half, and to dam back thereon for the purpose of the *saw-mill and factory*, to the same extent as before the conveyance. But,

Held, per A. Wilson, J., Richards, C. J., concurring, though absent, that no right or easement passed in respect of the grist-mill; and also, that the *parol* license was revocable; but that plaintiffs, the mortgagees of G. S., would be entitled in equity to restrain J. S. and those claiming under him from interfering with the right claimed respecting the grist-mill.

Per J. Wilson, J., that there passed by implied grant all the easements claimed, including those in respect of the grist-mill.—*Edinburgh Life Assurance Co. v. Barnhart*, 63.

EJECTMENT.

1. *Notice of title—Amendment refused—Alterations in will—Sheriff's sale—Deed made six years after—Secondary evidence of such deed.*

In ejectment the plaintiff, by his notice, claimed as devisee of F.,

defendant under a Sheriff's deed to one M., upon a *fi. fa.* against F.'s land. Defendant having proved such deed, *Held*, that the plaintiff could not in answer, under his notice, rely upon twenty years' possession held by him subsequently; and defendant having been in possession eighteen years, the Court refused to allow an amendment of plaintiff's notice.

In the will the number of the lot devised had been altered from eighteen to seventeen, the former number having been struck out and the latter written over it. The alteration was in the same handwriting as the will and at the foot of the will, before the attestation clause, was a note in the same hand, "the word seventeen being the true number of the said lot."

It was proved that the testator owned only lot seventeen: *Held*, that the plaintiff was bound to shew that the alteration had been made before execution, but that the jury might infer it from these circumstances; and *Seemle*, that the note should be treated as part of the will.

The Sheriff's deed was not produced, and after giving evidence of a search, which the Court held sufficient, defendant, in order to prove it, put in an exemplification of the judgment against F. and of the *fi. fa.* goods returned *nulla bona*, and he produced the *fi. fa.* lands found among the papers of the Sheriff, since deceased, with a memorandum annexed, written and signed by the Sheriff, stating that this lot had been sold at Sheriff's sale, 11th December, 1824, for £125, to M., who had paid the Sheriff's fees. The *Gazette* containing the advertisement of the sale of this lot on that day under the execution was

also produced. A memorial was then produced from the Registrar's office of a deed dated 16th December, 1830, by which the Sheriff, in consideration of £125, granted F.'s interest in this lot to M. Possession had not been taken under the alleged deed till eighteen years afterwards, but it had gone for the last eighteen years in accordance with the title derived through it: *Held*, that the Sheriff could, in 1830, make a deed under the sale of 1824, notwithstanding the debtor's death; and that the evidence was sufficient to establish such deed.

Variances between the amounts in the judgment and *fi. fas.* were held immaterial, as they could not avoid the sale.—*Nathan Fields v. John Livingstone, the younger, and George Wightman*, 15.

2. *Conveyance of pews—Validity of deed, though grantee not described as member of Church of England—Evidence of membership—Secret trust in favor of parties ineligible to hold pews, does not vitiate deed at law—Church Temporalities Act—Ejectionment does not lie for pews—Case proper remedy for disturbance of right thereto—Amendment.*

Defendant, being the holder of certain pews situated in the gallery and aisles of the Church of St. James, in the City of Toronto, belonging to the Church of England, conveyed the same by deed to plaintiff, a member of that Church. It appeared that the deed, though made nominally to plaintiff, was in reality so made to him in trust for a corporation, to secure an advance of money by them to defendant, and moreover, that several members of the corporation belonged to other religious denominations.

Plaintiff was not described in the

deed as a member of the Church of England, but the evidence at the trial shewed that he had been in the habit of attending the services of that Church:

Held, that there was sufficient evidence that the plaintiff belonged to the Church of England, and that it was not necessary that he should have been so described in the deed.

Held, also, that the deed, even if clothed with an unexpressed trust in favor of a corporation, incapacitated under the Church Temporalities Act from being pewholders, by the reason of their not belonging to the Church of England, was nevertheless not void *in the eye of a Court of Law*, because it was apparently good on its face, and it was therefore binding between the parties to it.

Semble, that a Court of Equity would set aside the deed on account of the existence of such secret trust, but that a Court of Law could not recognize it, even if it were set out.

Held, also, that plaintiff could not maintain ejectionment for the pews, because he was not entitled to the exclusive possession of them, his possession being limited to the special purpose of attending Divine service, at which time alone he had the right to enter; and because such right was of an incorporeal nature, and possession of it could not be given by the Sheriff.

CASE is the proper remedy for the disturbance of the right to occupy a pew.

Definition of the words "absolute purchase," contained in sec. 7 of the Church Temporalities Act.

The Court *in banc*, after verdict and exception taken, amended the record in ejectionment, by adding the

words "lands and premises" to the property sued for.—*Ridout v. Harris*, 88.

3. *Guardian and Ward—Consol. Stat. U. C. ch. 74, s. 5.*

Consol. Stat. U. C. ch. 74. s. 5, does not vest the real estate of an infant in the guardian, and such guardian cannot, therefore, bring ejectment in his own name: he must proceed, as guardian, in the name of the ward. *Doe Atkinson, v. McLeod*, 8 U. C. R. 344, distinguished.—*Kinsey v. Newcombe*, 99.

4. *Acquisition of title before writ of possession executed—Stay of proceedings—Amendment of writ after sale of lands thereunder.*

Where a defendant in ejectment, after judgment against him, but before writ of possession executed, acquires the title to the land, the Court will stay the execution of the writ of possession.

To support a sale of lands under a *fi. fa.*, the writ must correspond with the judgment; but the amendment thereof, even after sale, will cure the defect.—*Helm v. Crossin*, 156.

5. *Joint action—Several possession—Incompetent witness.*

The present Ejectment Act changed the mode of procedure rather than the law for the recovery of land, and therefore the right which prevailed under the old practice, to bring the action against all persons found in possession of land, without reference to whether their possession was joint or several, still exists; and the disclosure by one that he occupies a part of the land claimed not jointly with another defendant, does not entitle him to

have his name struck out of the writ, and oblige the plaintiff to proceed against the other alone; but the Act provides a mode by which every one may defend, by limiting his defence to the particular part claimed, and where a joint action is brought against two parties found in possession of one lot, and their occupation is several, one is not thereby rendered a competent witness for the other.—*Bannerman v. Dewson et al.*, 257.

6. *Notice of title—Practice.*

Held, affirming the judgment of the Court of Common Pleas, *ante* p. 34, *Draper, C. J., VanKoughnet, C., and Hagarty, J., dissentientibus*, that a plaintiff in ejectment, having by his notice claimed under his paper title, could not, in answer to a lease of the premises from him to defendant, set up by the latter, rely upon the forfeiture of such lease by reason of condition broken, but that, to entitle him to take advantage of such forfeiture, he should have alleged it in his notice.—*Henry Pettigrew (plaintiff below) Appellant, v. Edmund Doyle (defendant below), respondent*. 459.

See NEW TRIAL REFUSED, 1.—LIMITATIONS (STATUTE OF), 2.—AMENDMENT.

7. *Covenant to stand seized—Conveyance by Sheriff out of office—Estoppel in pais—C. S. U. C. ch. 22, sec. 269.*

In ejectment plaintiff claimed under a sealed instrument executed in his favor by one M., and witnessing that in consideration of prior indebtedness for professional services, and to secure plaintiff for future services of the same kind, and of the sum £25 already paid and

advanced by plaintiff to him, &c., he (M.) covenanted, granted, and agreed that he would *stand seised and possessed of the land in question, to the use of plaintiff, his heirs, and assigns, by way of charge, security and mortgage* on the land, for said moneys and costs; and when plaintiff's costs were taxed, he was to be at liberty to hold the instrument as and by way of a *charge, mortgage, and security upon the land for the amount so to be ascertained*, or M. would; and he covenanted that he or his heirs would, on demand, execute a good and sufficient mortgage in law, with bar of dower, if necessary, and usual covenants, &c.: *Semble*, that the instrument was not void for champerty or maintenance; and *Held*, that it could only operate under the Statute of Uses, as being granted on a money consideration, which appeared from the express recitals contained in it; and *Semble*, that full effect would be given to the whole instrument and the real intent of the parties carried out by holding that it was to operate as a charge, security and mortgage in equity on the land until plaintiff's claim was ascertained by taxation, and so continue as an equitable charge, unless plaintiff desired a legal mortgage, which in that case M. covenanted to execute. *Quære*, whether plaintiff took the legal estate, so as to enable him to maintain ejectment.

The land in question was brought to sale by the Sheriff under several executions against M., one of which was issued by a client of plaintiff. Plaintiff's agent attended and bid at the sale, and the land was knocked down to him at the price offered, being sufficient to cover the amount of the execution. The defendant McIntyre also offered

the same price. Before the completion of the sale, however, plaintiff notified both his agent and the Sheriff that an injunction had been ordered by the Court of Chancery to issue restraining the sale, and that if the same were carried out he would apply to set it aside. This notice was followed by one from plaintiff's agent to Sheriff, to the effect that the latter was at liberty to convey the land entered in his name at the sale to any person he thought fit, as he relinquished all claim and interest therein. The Sheriff accordingly, upon the injunction being subsequently dissolved, conveyed the land to the defendant McIntyre for the price bid by him at the sale:

Held, that in the absence of any evidence to the contrary, it must be assumed the Sheriff had proceeded regularly in conveying the land to McIntyre, and that no one appearing to be prejudiced by the transfer, the Court was bound to uphold it.

Held, also, that taking all the facts together—that it was the means by which his client had obtained satisfaction of his debt, and that it was made under the express authority of his agent, and so under his own authority,—plaintiff could not be heard to impugn the conveyance to McIntyre.

Held, also, that the deed in question, having been executed by the Sheriff out of office, but in completion of the sale made by him whilst in office, was valid under sec. 269 of C. S. U. C. ch. 22.—*Miller v. Stitt and McIntyre*, 559.

8. *Effect of appearance only—Devise to sell for payment of debts—Delegation of power.*

In ejectment defendant simply entered an appearance to the action,

without filing any notice of title : *Held*, that he could not at the trial set up a title in himself by possession, the effect of his appearance being merely to deny the title of the claimant, and this denial meaning that any answer might be made to it which did not assert title in defendant, or in any one under whom he claimed. In such a case the plaintiff must prove a strict title, and defendant may shew that this title has not been perfectly proved, or, being proved, he may shew a better title in some one else, but not in himself, or in any one under whom he claims.

A testator devised all his real and personal estate to his executors in fee in trust for sale to pay debts :

Held, on the authority of *Stronghill v. Ansley*, 16 Jur. 676, that a *bonâ fide* purchaser for value was not bound to enquire whether there were debts which authorized the executors to sell.

By a subsequent clause in his will the testator directed that all his real estate, not specially devised or required to pay debts, should be sold by his executors as they thought best, and the moneys arising from the sale and from other sources should after payment of debts be invested by them : *Quære*, whether a mere power was created by this clause of the will, and if so, whether it was well executed by a delegated power; or whether, on a fair construction of the whole will, and to give effect to the general purpose which the testator had in view, a similar estate might not be deemed to be continued in the executors for the objects of the second as well as for those of the first clause.—*Burke v. Battle*, 478.

9. *Amendment at Nisi Prius*—C. S. U. C. ch. 22, s. 222.

Under sec. 222 of C. S. U. C. ch. 22, a Judge at *Nisi Prius* has the same power of amendment in Ejectment as in any other action, and a *Nisi Prius* amendment of a plaintiff's notice of title was, therefore, held to have been properly made.—*Chadsey v. Ransom*, 629.

Under a Sheriff's deed, by execution creditor against debtor.—See EVIDENCE, 6.

See WAIVER.—LEASE, 1.—EVIDENCE, 6.—LIMITATIONS (STATUTE OF), 1—NEW TRIAL REFUSED—PLEADING, 3.

ELECTION.

Plaintiff not bound to elect upon which of three counts he will go to jury, although founded upon one and same wrong.—See DISTRESS, 2.

EQUITABLE PLEADINGS.

1. *Accord—Pleading.*

To an action on the common counts by plaintiffs, as executors, defendant pleaded, on equitable grounds, that defendant and testator were partners in the purchase of certain lands in the United States of America, and also in some shares in a certain railway company, for which they were to pay in equal proportions, and were to share equally in the profits and losses; and that being so interested, it was, after the death of the testator, agreed between plaintiffs and defendant that if defendant would assume and pay the calls on the railway shares, take the stock as his own and

relieve plaintiffs from all liability thereon, no claim should be made upon him for the balance due on the lands, but that plaintiffs should pay the same, and the payments so made should remain as a first charge upon the lands. The plea then averred performance of the agreement on defendant's part, by assuming the stock, paying the calls, and relieving plaintiffs of liability on account thereof, and alleged that the causes of action were for sums paid by plaintiffs, after the agreement respecting said lands :

Held, on demurrer, a good plea, both as a legal and an equitable defence ; and that if it was necessary to the validity of the agreement that there should have been a writing, it must be assumed, on demurrer, that there was one.—*Clarke et al., Executors, v. Carroll, 538.*

ESCAPE WARRANT.

Arrest on mesne process—Bail—Return of non est inventus to ca. sa. to fix bail—Render by bail—Escape-warrant—1 Anne, st. 2, ch. 16, & 5 Anne ch. 9—Voluntary escape from mesne process—Practice as to issuing ca. sa. in such case—Charging in execution, meaning of—Rules nisi, practice as to drawing up—Rescinding Judge's order, practice as to—C. S. U. C. ch. 9, s. 2.

When a party, arrested under *capias*, pending action and before judgment, gives bail, and after judgment, and *ca. sa.* to fix bail returned *non est inventus*, is rendered to the Sheriffs custody by his bail, in their own discharge, such prisoner is still held under *mesne process*, and is not confined in execution.

The English Statutes 1 Anne st. 2, c. 6, and 5 Anne c. 9, relating to escape-warrants, are not in force in this Province. (*A. Wilson, J. dissentiente*).

After a voluntary escape from the Sheriff of a prisoner held under *mesne process*, plaintiff may proceed with his action, and, *Semble*, may issue a *ca. sa.* without affidavit, if he has had a *capias* pending action, or an alias *ca. sa.*, if the *ca. sa.* to fix bail has been returned *non est inventus*, and take the defendant thereunder ; and at all events, plaintiff may have a *ca. sa.* issued on a new affidavit and re-arrest defendant.

Quære, whether, after voluntary return of escaped prisoner, a plaintiff cannot accept such a return and lawfully charge his debtor in execution, by merely delivering a *ca. sa.* to the Sheriff: *Per A. Wilson, J.*

Charging in execution is the process whereby a prisoner in actual confinement is detained in custody, whether at suit of the same or a different plaintiff: *Per A. Wilson, J.*

When a rule *nisi* on the face of it refers to papers and affidavits filed, this is sufficient in ordinary cases ; but in applications touching awards, and in proceedings to bring a person into contempt, the particular materials moved upon should be specified.

When an *ex parte* order made in Chambers is complained of, an application should be made to the Judge, upon summons, to rescind his own order, before appeal to the full Court ; but the Judge sitting *in banc* may assent to his own order being moved against in the first in-

stance: *Per Richards*, C. J. Such rule does not apply to cases where the authority and jurisdiction of the Judge making the order are questioned: *Per A. Wilson*, J.

Meaning of terms "Statutes for the amendment of the law, excepting those of mere local expediency," used in C. S. U. C. c. 9, s. 2, discussed.—*Hesketh v. Ward*, 667.

ESTATE.

Conferred by sealed instrument.]—*See TRESPAS, qu. cl. fregit.*

ESTATES TAIL.

Devise—Estates tail—Non-registration of deed barring—Effect upon grantor and subsequent grantee, during grantor's life—Non-registration under General Registry Act—Effect on purchaser for valuable consideration.

A testator, seised in fee of land, having devised to one of three sons, "to be by him entailed to any of his issue he may think proper," with the further provision, that if any of the three should die without issue, the property should "be divided equally between their successors, subject to entailment," died before 6th March, 1834. In November, 1851, two of the sons, D. and R., by deed conveyed their estates in the land to the third son, C. This deed was never registered.

C. had a child, which predeceased him.

By several deeds, executed respectively in February and March, 1865, D. and his assignee in insolvency conveyed to plaintiff. Both

these conveyances were duly registered:

Held, that the three sons took estates tail in the land; that D. and R. had a contingent interest in fee tail on failure of the issue of C.; and that D., as the heir-at-law of the testator, had the reversion in fee.

Held, also, that although the deed of November, 1851, may not for want of registration, under C. S. U. C. ch. 83, sec. 31, have barred the entail as against their issue, it did pass the individual rights of the grantors during their lives; and that as D., under whom alone plaintiff claimed was still alive and could not impeach this deed, no more could plaintiff, who took no higher interest than D. had it then in his power to transfer.

Held, also that if the title had been a registered one before 1851, of which there was no evidence, and if plaintiff had relied on the non-registration of this deed under the General Registry Act, he would, upon proof that he was a purchaser for valuable consideration (as to which, however, the evidence was otherwise), have been entitled to succeed as to that portion of the land which D. himself could have claimed, just as if the deed of 1851 had never been executed.—*Dumblie v. Johnson et al.*, 9.

ESTOPPEL.

See EVIDENCE, 3—*WAIVER*—*PLEADING*, 3, 7—*EJECTMENT*, 7—*COSTS*.

EVIDENCE.

1. *Conveyance in fee—Lease for five years—Evidence.*

The evidence shewed that A. B., the ancestor of the female plaintiff, through whom the title was claimed, lived on the land in question in 1832, claiming it as his own, until 1843, when he left it; and a witness deposed to having been told by A. B. and another that they had exchanged farms and made deeds to one another, the witness stating that he had read the deed to A. B., dated before 1832. Another witness, the second wife of A. B., stated she gave to W. B., a son of A. B., and husband of defendant, the deed in question; and there was also evidence that W. B., before his death, told a witness examined at the trial that he had got this deed, which he shewed to witness:

Held, sufficient evidence of a deed in fee to A. B.

A witness testified that A. B. leased the land to B. for five years; that both parties had informed him of this; that B. went into possession and told him he was a tenant to A. B.; and that he remained on the land until the fall of 1843; that W. B. moved on and lived there with B.; and that both said the former had bought out the balance of the latter's term; that he heard of both having gone to one L. to have the lease signed, and W. B. said they had been there to get "the writings" signed. Another witness, the second wife of A. B., stated that B. had a lease for five years from March, 1843, at a certain rental, and that B. and her husband had both told her the terms of the lease. A third witness, the wife of B., said that her husband and she moved on to the land in 1843 under a lease from A. B., her father, for five years, and that her husband lived there for several months, when he sold out to W. B.: *Held*, sufficient

evidence to warrant a jury in presuming a lease, both in law and in fact, for five years from March, 1843; and that from such evidence the lease might have been inferred to have been in writing; first, because there could not have been a valid lease in 1843 for five years except in writing; and secondly, because W. B. spoke of the assignment from B. to him as being in writing.—*Steinhoff and Wife v. Burtch*, 160.

2. *Variance between declaration and agreement produced—Right to recover—Liquidated damages—Absence of plea of circuity of action, effect of.*

The declaration is set out in 16 C. P. 331.

The second count stated that the instalment of \$1000 was to be paid down *for the purpose of satisfying thereout and discharging the said mortgages from the land*: *Held*, that it was not necessary to prove this purpose, and that evidence of it offered at the trial, the terms not being contained in the agreement, did not make any alteration in the contract, and that the plaintiff should not, therefore, have been nonsuited.

Held, also, that inasmuch as the plaintiff was entitled to sue for the \$1000 independently of any act which he had to do in conveying or making a good title, and as nothing appeared in the pleadings to this count which shewed that there would be any circuity of action created by his recovering upon it, the plaintiff was entitled to the \$300, as liquidated damages.

The nonsuit was, therefore, set aside, the defendant being allowed to plead the defence of circuity of action.—*Koster v. Holden*, 139.

3. *Loss of goods by fire—Special conditions—Non-delivery of entire consignment—Acceptance of mixed goods—Estoppel—Conversion—Evidence—Proper direction to jury—New trial.*

The first count of the declaration stated that defendants agreed to carry 3244 pounds of Canadian wool from T. to P. by rail and thence to B. by steamboat or rail, and deliver there to plaintiff, certain perils and casualties excepted: *breach*, they did not deliver. 2nd count, same as first, but alleging they were to carry and deliver within reasonable time: *breach*, they did not carry within reasonable time, whereby the plaintiff was put to expense for want of the wool, and by reason of the delay was obliged to sell at less price, &c. 3rd count, that defendants agreed properly to stow and safely carry and deliver the wool, certain casualties, &c.,: *breach*, the defendants so negligently conducted themselves that by reason thereof, and not of any excepted perils or casualties, the goods were greatly damaged. 4th count, trover for the goods.

Defendants pleaded (1), to the first three counts, that they did not promise, and to the 4th count, not guilty; (2), to the 1st, 2nd, and 4th counts, that the goods were delivered to and received by defendants upon the conditions that defendants should not be liable for damages arising from delays from storms, accidents, unavoidable causes, or from damage from the weather, fire, &c. The plea further averred that these conditions were contained in the written request made by plaintiff to defendants to receive and convey, and defendants received them on these conditions, and gave

plaintiff a receipt for the goods containing these conditions; that the goods in course of carriage caught fire, and were damaged and destroyed; that the fire was accidental, and therefore defendants were prevented from delivering the goods. (3) To first three counts, a denial of receipt of the goods on the terms and conditions mentioned. (4) To 3rd count, that they used proper care in the carriage and stowage of the goods.

The evidence was, that on 6th September, 1864, plaintiff delivered to defendants thirteen sacks of wool, weighing 3244 pounds, addressed to the consignees in B., to be sent subject to defendant's tariff and to the conditions contained in the plaintiff's written request to defendants to receive same, defendants giving a receipt with similar conditions thereon. This wool was put into a car with wool from Michigan, consigned to one R., together with certain dutiable goods, and all arrived at Island Pond on 18th September following, where they were detained by the Customs authorities. The car subsequently took fire, and the sacks containing the wool were burnt. Some of the wool was also burnt and some of it singed. In endeavouring to save it the wool became mixed and was carried in this state to P., where new sacks were obtained and the wool conveyed in them to B., and the thirteen sacks delivered to the consignees on 22nd October, but containing only 2498 pounds instead of 3240, which the bill of lading shewed. On the delivery of four additional sacks, the weight being still short by twenty-nine pounds, an examination of the wool was made, when it was found to consist

of 873 pounds of Canada fleece, 1160 scorched Canada, and 1168 pounds American fleece damaged by fire. This was sold on plaintiff's account, but did not realize as much, it was proved, as it would have brought had it arrived about a month earlier. It further appeared that 962 pounds Canada fleece had been delivered to R.

The Judge charged the jury that defendants were not liable for the damage by fire, or for the delay at Island Pond, as they had not contracted to guard against this; that plaintiff was entitled to such damages as arose from defendants' neglect in delivering mixed instead of all Canadian fleece, and for the amount of short weight.

The jury gave plaintiff \$300 damages:

Held, that the 1st and 2nd counts, not embodying the exceptions contained in the contract, were not proved on the trial; that the 3rd count was not sustained by the evidence, and that to enable plaintiff to succeed he ought to amend.

Held, also, that plaintiff could not recover for the short weight, the evidence shewing a loss by fire of a considerable portion of the wool, and of the sacks, which would cause a diminution in the weight.

Held, also, that plaintiff was not estopped by the taking of the American wool from shewing a conversion by defendants of the Canadian wool; but that had defendants pleaded that he took the latter in lieu of the former, or of so much thereof as was deficient, there was evidence to go to the jury to warrant a verdict for defendants to a certain

extent, if not for all that really ought to have been delivered.

Held, therefore, that there ought to be a new trial, costs to abide the event; and that the proper direction to the jury would be, that defendants were not liable for the loss by fire; that they were liable for the wool belonging to plaintiff, which they carried to B., and did not deliver; but that if plaintiff, with the knowledge of all the circumstances the evidence disclosed, took the one kind for the other and sold it, when he might have had his own, and the damaged Canadian wool was delivered to the consignee of the American wool with plaintiff's consent, in consideration of his getting the American in lieu of it, then plaintiff could not claim substantial damages either for breach of contract or for the wrongful conversion—*Milligan v. Grand Trunk Railway Co.*, 115.

4. *Foreign judgment—Evidence—Imp. Act 14 & 15 Vic. ch. 99, sec. 11—Proof of identity.*

Plaintiff produced, as evidence of a judgment against defendant, in the Court of the Exchequer of Pleas, in England, a *certified copy* thereof under the hand of one of the Masters of that Court: *Held*, that as the document produced would not be received in England, if the existence of the judgment was in issue, it was not, therefore, under the Imperial Act 14 & 15 Vic. ch. 99, s. 11, admissible here, where the judgment was likewise questioned by the plea on the record, but that plaintiff should at least have produced an exemplification under the seal of the Court. *Quære*, whether the document referred to

is under the seal of the Court. It is not, however, an exemplification, and would not be here received as such from one of our own Courts.

Plaintiffs offered no proof of identity of defendant with the person named in the judgment in question :

Semble, that as defendant had pleaded in confession and avoidance, this, coupled with the identity of name, was some evidence to go to the jury of the identity.—*Hesketh v. Ward*, 186.

5. *Sale of goods—Original liability—Evidence—Promise to pay not in writing—Statute of Frauds—New trial.*

Plaintiff by an instrument under seal agreed with S., for whom defendant was guardian, S. being then under age, for the sale to him of his tools and stock-in-trade, and the good-will of his business, as a tin-smith, and S. gave plaintiff an order on defendant for payment out of moneys in his hands belonging to him. It was proved that plaintiff went to defendant's shop about two days before S. got the goods and asked him whether he would pay for them if plaintiff delivered them to S., stating that he would not deliver them unless defendant would do so. Defendant replied he would say nothing about it until S. and plaintiff were both present. On the following day, before the sale of the goods, an entry was made in defendant's pass-book, used for entering daily sales, that S. had bought of plaintiff the goods in question at the price agreed upon. On all three meetings defendant asked S. if it was all right, and he was to pay the amount to plaintiff.

S. said, yes. Defendant said he could give plaintiff some money then and would pay him the balance again. On this plaintiff said he would let S. have the goods, of which the latter immediately took possession. A witness stated that he understood plaintiff was to look to defendant for payment, and that the goods had been bargained for between plaintiff and S. before he went to defendant to ascertain if he would pay for them. Another witness testified that plaintiff's clerk told him defendant was charged in plaintiff's books; that the goods were so charged to S. on the day of the sale, or the day after; that he had seen this charge, but did not know to whom the goods had been sold: it did not, however, appear that this entry had been made at the time of the transaction, or with defendant's knowledge. An account was, also, proved in the handwriting of plaintiff's clerk, charging S. with the goods. Subsequently S. directed defendant not to pay plaintiff the amount of the account :

Held, that setting aside the question of infancy, there was no evidence of original liability on the part of defendant, or his property, for the price of the goods, but that the only liability which arose was from the promise of defendant to pay plaintiff the amount, and this promise was not in writing, and was therefore void under the Statute of Frauds. But, as the point suggested on the argument, that S., being an infant, could not be primarily liable, and defendant must be, was not taken at the trial, the Court granted a new trial, costs to abide the event.—*Merner v. Klein*, 287.

6. *Purchase of land by execution creditor—Ejectment—Evidence.*

Held, following *Delisle v. Dewitt*, 18 U. C. 155, *McNeil v. Roe*, 7 C. P., p. 191, *Field v. Livingstone*, 17 C. P. 15, that in ejectment under a Sheriff's deed, by the execution creditor (the vendee of the Sheriff) against the debtor, the plaintiff need not prove the judgment, but may rely on proof of the Sheriff's deed and sale by him under the *fi. fa.* lands.

Doe Bland v. Smith, 2 Stark. 199, referred to.

In this case the plaintiff produced the original judgment, but upon its being objected that it was not stamped, he withdrew it by leave of the Court, and rested his case upon the *fi. fa.* lands :

Held, that the judgment having been withdrawn as evidence by leave of the Court, must be considered as if it had never been offered.

Semble, that defendant's proper course, if he desired to shew the invalidity of the judgment, and the execution issued under it, was to have given it in evidence himself. — *Ralston v. Hughson*, 364.

7. *Foreign judgment*—23 Vic. ch. 24, s. 1—*Onus probandi*.

In an action on a foreign judgment, if the judgment is not impeached or denied, it is *prima facie* evidence against the defendant.

In this case, which was an action on a judgment obtained by plaintiff against defendant in one of the United States of America, defendant pleaded 1st, that the judgment had been recovered for moneys alleged to have been payable by defendant to plaintiff for money paid by plaintiff for the use of defendant, and that he was never indebted as

alleged ; 2nd, Payment before judgment :

Held, *J. Wilson, J.*, *dissentiente*, that the *onus probandi* was upon defendant, who ought to have begun, and that having refused to do so, a verdict was properly entered for the plaintiff.—*Manning v. Thompson*, 603.

Admissions and declarations of prisoner.]—See CRIMINAL LAW, 2.

Of intent, and of being in arms with intent, to levy war against the Queen.]—See CRIMINAL LAW, 2.

What and when admissible against all at any time concerned in a common design.]—See CRIMINAL LAW, 2.

Duty of Court as to, under the Statute respecting new trials in criminal cases.]—See CRIMINAL LAW, 2.

Of Statute Labour—insufficient to establish road as highway.]—See HIGHWAY, 1.

On motion to enter nonsuit, pursuant to leave, Court will not consider whether there is a scintilla of evidence, &c.]—See BREACH OF PROMISE OF MARRIAGE.

From which an inference might be drawn as to where affidavit sworn.]—See CRIMINAL LAW, 3.

As to the party administering the oath, and the party taking it.]—See CRIMINAL LAW, 3.

Of election to forfeit.]—See AGREEMENT FOR PURCHASE OF LAND.

Of seisin, in Dower.]—See SEISIN.

Of Membership of Church.]—See EJECTMENT, 2.

See NEW TRIAL REFUSED, 1—
EJECTMENT, 1, 2, 4—LEASE, 1—USE
AND OCCUPATION—PAROL EVIDENCE
—USURY—HIGHWAY, 1, 2—CRIMI-
NAL LAW, 4—DEED BY MARRIED
WOMAN.

EXCESS.

Must be replied in assault and battery.]—See ASSAULT AND BATTERY.

EXCESSIVE DAMAGES.

On motion to set aside verdict for, form of rule absolute, in trover for Solicitor's docket.]—See TROVER.

EXECUTION.

Priority over attachment]—See INSOLVENCY, 3.

Of Hab. Fac. Pos. stayed, after judgment, where defendant meantime has acquired title]—See EJECTMENT, 4.

EXECUTION CREDITOR.

Evidence necessary by, in ejectment under Sheriff's deed against execution debtor.]

See EVIDENCE, 6.

EXECUTOR.

Executor of Executor—Consol. Stat. U. C. ch. 16, s. 1.

Held, affirming the judgment of the County Court, that an executor of an executor represents the original testator, and is properly pro-

ceeded against on a claim against him.

Under Consol. Stat. U. C. ch. 16, s. 1, the renunciation of probate by one of two or more executors is peremptory, and cannot be recalled on the death of the acting executor or executors.—*Allen v Parke*, 105.

EXECUTOR DE SON TORT.

Term of years—Pleading.

Held, that the sale of the reversion in a term of years under *fi. fa.* on a judgment against executor *de son tort* is a valid sale as against the rightful administrator; and *Seemle*, it is not necessary to the validity of the sale that the *tort* executor should have been in actual possession in respect of the term.—*Bain (Administrator) v. McIntyre*, 500.

EXEMPTION.

From seizure, of goods in actual use.]

See REPLEVIN.

EXPRESS GRANT.

See EASEMENTS.

EX PARTE ORDER.

Practice as to rescinding, when made by Judge in Chambers.]—See ESCAPE WARRANT.

EXTENSION OF TIME.

For payment.]—See AGREEMENT FOR PURCHASE OF LAND.

FENCE VIEWER'S ACT.

See PLEADING, 8.

 FI. FA.

Tested in name of puisne Judge.]
See LIMITATIONS (STATUTES OF), 1.

To support sale of lands under, must correspond with judgment.]—
See EJECTMENT, 4.

 FINAL JUDGMENT.

See SETTING ASIDE PROCEEDINGS.

 FIRE INSURANCE.

See AGENT.

 FIXTURES.

Fixtures—Lease or License to occupy for oil purposes—New trial refused.

As regards the question of fixtures, the tendency of modern decisions seems to be to effectuate the apparent intention of the parties at the time the article in question was attached to the freehold.

In this case, defendant leased to M. a certain lot of land for 25 years for the purpose of boring for oil, salt, or minerals, with right of ingress and egress in a certain designated manner. M. was to pay an advance of \$35 on oil, and one-eighth part, every three months, of all oil obtained, and was to be allowed two years for testing the oil-bearing character of the land, when, if oil were not found in paying quantities, the lease was to be null and void, and plaintiffs were to return the \$35 advanced. Defendant was to

have the free use of the premises for agricultural purposes, except such portions as should be required for the oil operations.

Before the expiration of the two years a steam engine belonging to plaintiff was placed by them upon the land, for the purpose of drilling the rock and experimenting for oil. It rested on sills let into the ground, and was fastened to the sills by bolts and spikes. It was similar to others which it appeared were moveable, and were used on the surface for the purpose of sinking shafts to test whether or not there was oil there. The two years having elapsed without M. obtaining the oil, defendant declared the lease forfeited, and resumed possession of the land, and claimed the engine as part of the freehold :

Held, that under the facts disclosed, the engine was not a fixture ; for that the evident intention of the parties to the instrument was, that the first proceeding should be to ascertain whether oil could be obtained, which was but a temporary proceeding, and therefore any machinery used for the purpose could not be said to have been placed there for the permanent benefit of the inheritance, nor yet as trade fixtures, for neither then nor afterwards had any trade been carried on there ; besides, the object of any annexation to the soil was merely to steady the engine, not to improve the inheritance.

Quere—Whether the instrument in question amounted to a lease, or was a mere license to bore for oil, salt, or minerals.—*Burnside et al. v. Marcus*, 430.

 FOREIGN JUDGMENT.

See EVIDENCE, 4, 7.

FORFEITURE.

Provision for, on default in payment of price of land.]—See AGREEMENT FOR PURCHASE OF LAND—See WAIVER.

FRAUDULENT CONVEYANCE.

Fraudulent conveyance of land—Immunity of aftergrown crops from seizure under execution against vendor.

Though a sale of land may be fraudulent as against creditors, still, where the evidence shewed that the execution debtor (the vendor) had not raised the crops, the subject of the seizure, or furnished the means of doing so, but the labor and means had been contributed by the vendee alone, *Semble, J. Wilson, J., dissentiente*, that the crops were the sole property of the vendee as against the execution creditor.—*Kilbride v. Cameron, 373.*

GENERAL REPUTATION.

Good primâ facie evidence of marriage, in an action of dower.]—See SEISIN.

GRANTEES.

Of patentees of Crown of public highway, liable for repairs, notwithstanding agreement as to non-liability.

See HIGHWAY, 3.

GUARDIAN.

Not invested with real estate of infant under C. S. U. C. ch. 74, s. 5,

and cannot bring ejectment therefor in his own name.]—See EJECTMENT, 3.

HAB. FAC. POSS.

Stay of, before executed, where defendant after judgment acquires title]—See EJECTMENT, 4.

HARBOUR COMPANY.

Pier—Lights—Actual notice—Damages—Pleading.

In an action against a Harbour Company, charging that it was their duty to keep a sufficient light upon the end of one of their piers, as they had been in the habit of doing, to enable vessels to enter with safety, and that they had wrongfully removed such lights without giving sufficient public notice, by reason of which the plaintiff's vessel, while endeavouring to enter the said harbour, had been lost, *Held* :

1. That the arbitrator, to whom the matters of fact had been referred, having found that it was necessary that such a light should be maintained for the proper use of the harbour by vessels entering in the night time, and that the immediate cause of the loss was the absence of the light, the defendants were *primâ facie* guilty of a negligence, for the consequences of which they were liable.

2. That even if the defendants would under certain circumstances be justified in closing their harbour to vessels, and removing the light, they were bound to give reasonably sufficient notice of the same, and that the notice given was not of that character.

3. That in addition to the value of his vessel, the plaintiff was entitled to recover a further sum expended by him in good faith, and with a reasonable expectation of success, in attempting to raise the vessel, for the purpose of repairing her.

4. That an Insurance Company, which had a risk upon the vessel, was not entitled to recover, in the name of the plaintiff, moneys expended by it in a similar attempt.

Semble, that a plea of not guilty put in issue the negligence only, and not the duty alleged.

Remarks upon the extent to which the possession of means of knowledge furnishes evidence of actual knowledge.—*Sweeney v. The President, Directors and Company of the Port Burwell Harbour*, 574.

HASTINGS.

Defects in registration in County of.—See REGISTRATION.

HIGHWAY.

1. *Obstructing—Authority of Commissioner of Crown Lands to open roads—Evidence of performance of statute labour.*

Held, quashing a conviction for obstructing a highway, that the Commissioner of Crown Lands has no authority to open roads on lands granted by the Crown, and any money expended for such purpose, under authority so given, is not public money within 22 Vic. ch. 54, sec. 313; and the roads so opened do not, therefore, become public highways under that Act.

It appeared from the evidence that statute labour had been per-

formed on parts of the road in question, but only to a very limited extent, and not from time to time, so as to shew that it was a road “whereon the statute labour hath been usually performed:”

Held, not sufficient to establish the road as a public highway under the Act above referred to.—*Regina v. Hall*, 282.

2. *Evidence—Adoption by Crown of original survey and consequent inability to alter—Grant to private individual.*

In the year 1826 the original town-plot of London was surveyed under instructions from the Crown, and the plan of such survey, with the field notes, shewed that two of the streets, for obstructing portions of which the defendant was indicted, were extended to within four rods of the river Thames, which runs through that town. The overseer of highways for the years 1829, 1830, 1831, stated that he had traced the streets in question all through; that the posts were there; that he opened the streets by the posts; that there was a road reserved four rods along the river bank; that one of the streets ran down to the river, and the posts were then four rods from the river, when he opened that street.

In 1832 one R. was duly instructed to survey a mill-site in the town and to lay off for the purchaser such ground as might be necessary, and he thereupon ran a line which crossed these two streets, as designated upon the original plan, and cut off portions of several town lots laid out upon this plan.

In 1839 a mill site was sold by the Crown Land Agent to one B. (under whom the defendant claimed), not according to R.’s

survey, but according to a small plan obtained from the original surveyor, and the patent which issued in 1846 appeared to grant the land designated on this plan, making no reservation of streets, but including the extensions to the river of the streets in question, as laid out upon the original plan.

Previously, also, to this sale, lots had been sold on these streets by the proper authorities; the streets had been worked and improved, and one in particular was open to the river, and the other as far as where the obstruction stood:

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 145, that the evidence conclusively established that the streets in question had been laid out in the original survey of the town to within four rods of the river, and that this space was left open for public use; that the existence of these streets as public highways was shewn by the work on the ground at the original survey, and by the adoption, on the part of the Crown, of that work, as exhibited on the plan thereof returned, which adoption was established by the disposition of lands according to that plan of survey; that thereby these streets became public highways; and although prior to such adoption the Crown would not have been bound by either plan or survey, after such adoption there was no power of making such an alteration as would be necessary to establish the defence set up.—*Regina, Respondent, v. Charles Hunt (Defendant in the Court below), Appellant*, 443.

Right of Crown to lay out—See CROWN GRANT—See PLEADING, 3.

3. *Right of Crown to grant—Liability of patentees and their grantees for non-repair.*

Grantees of the Crown, of public highways, are indictable at the suit of the public for default in repairing such highways, although they are also liable to the Crown for the breach of their covenant to that effect contained in the patent; and this liability follows and accompanies the transfer of the property, so as to make the purchaser of part and mortgagee of the residue also indictable for the same cause, although it has been expressly agreed between grantor and grantee that the former shall and the latter shall not be bound to repair.

Semble, that an agreement by the Crown that the grantee should not be liable to repair, could not, with the grant of the tolls, have relieved them from the public duty of necessary repairs.

The patent, in this case, granted a certain public toll-bridge, with a planked and macadamized toll-road, together with all toll-gates on said road or bridge, “and now vested in us, and the tolls arising from said bridge and road, on certain conditions contained, &c.”: *Held*, that the patent was not *ultra vires*, but passed the soil and freehold and the right and franchise of taking tolls thereon and in respect thereof, and that the road was not at the time when, &c., a Government work, to be repaired by Government, but by defendants.

Held, also, that to maintain the indictment against defendants, it was not necessary that the Government Engineer should first have condemned the road by certificate.—*Regina v. Mills et al.*, 654.

IDENTITY.

Proof of.—See EVIDENCE, 4.

IMPERIAL MUTINY ACT.

Does not override Con. Stats. C. ch. 100.]

See CRIMINAL LAW, 1.

IMPLIED GRANT.

See EASEMENTS.

INCOMPETENCY OF WITNESS.

See EJECTMENT, 4.

INNKEEPER.

Liable to civil action under Temperance Act of 1864, though a felony committed and not prosecuted for.]—See PLEADING, 1,

INNOCENCE.

Presumption of, that defendant not guilty of conspiracy, an answer to any presumption of marriage ceremony to be drawn from cohabitation.]—See BREACH OF PROMISE OF MARRIAGE.

INSOLVENCY.

1. *Insolvent Act of 1864, sec. 11, sub-sec. 2—Adjournment—Power of Judge to direct proceedings in Chancery before second meeting—Right of assignee to select his own legal adviser.*

A disagreement having arisen between the majority in number and the majority in value of the creditors of an insolvent, a motion to adjourn, under sec. 11, sub-sec. 2 of the Insolvent Act of 1864, was

opposed by the latter; whereupon application was made to the Judge of the County Court to dispose of the matter, who ordered that the majority in number might proceed in Chancery, in the assignee's name, against the majority in value.

Semble, that neither party could legally oppose the adjournment, if it was insisted upon by the other, as it would have the effect of empowering the objecting party to prevent the Judge from adjudicating between them, as intended by the Act; but that such adjournment should have followed as of course, and upon a similar division of opinion the Judge should have decided between the two sets of resolutions, and might then have directed the assignee to proceed in Chancery, or otherwise contest the claim of those creditors whose debt was disputed. But *Held*, that the Judge had power to make the order in question and it was not, therefore, advisable to interfere with it.

The assignee has the sole right to select his own professional adviser, and he cannot be made to change him, except upon reasonable ground.—*In the matter of James Thomas Lamb, an Insolvent*, 173.

2. *Insolvency Act of 1865, sec. 2—Assignment by resident in Upper Canada to Assignee in Lower Canada—Pleading.*

Held, that the Insolvency Act of 1865, sec. 2, does not authorize a voluntary assignment to be made to an official assignee in any part of either Upper or Lower Canada: the obvious meaning of the Act is, that the insolvent may make an assignment to any official assignee entitled to take it under the Insolvent Act of 1864, without comply-

ing with any of the formalities or publication of the notices mentioned therein.—*White v. Cuthbertson*, 377.

3. Execution—Attachment—Priority.

By sec. 13 of 29 Vic. ch. 18, the divesting of any lien or privilege (*i.e.* priority of right) does not extend beyond the fact of levying upon or seizing under the writ of execution: it does not extend to the *sale* thereunder. In this case a writ of execution had been placed in the Sheriff's hands on the 15th March, 1866, and on the 26th of the same month a *sale* of the goods thereunder, commenced at 10. a. m., was completed at 11, a. m. At the latter hour of this subsequent day a writ of attachment was placed in the Sheriff's hands against the defendant:

Held, that the attachment was not entitled to prevail over the execution, and that the Sheriff was not, therefore, liable to the assignees of the insolvent for having sold under the execution.

Converse v. Michie, 16 C. P. 167, distinguished.—*Whyte v. Treadwell* (Sheriff), 488.

4. Preferential assignment in 1857—Neglect to keep proper books of account—Reference back to Judge *n* Insolvency—Practice.

The Judge in Insolvency refused an insolvent his discharge on the grounds, (1.) That he had made a preferential assignment in the year 1857. (2.) Because he had kept no books of account shewing receipts and disbursements of cash, and such other books as were suitable for his trade:—*Held*, as to the former ground, that it was not sustainable, for there was no law

against it when made; and that as to the latter, considering the short period which had intervened between the passing of the Act of 1864 and the application for discharge (some three months only), and the inconsiderable nature of the business in which he was engaged, the insolvent should not have been so severely dealt with, though this was a matter wholly in the discretion of the Judge in Insolvency. But as the Judge, though doubtful as to it, had not enquired into the *bona fides* with which the assignment of 1857 had been made and of the disposition of his property under it, the case was referred back to him for re-consideration on these points.

Semble, as to this assignment, that it could be impeached under sub-sec. 6 of sec. 9 of the Insolvent Act, only upon the ground that by it the insolvent had fraudulently retained and concealed some portion of his estate, or had been guilty of evasion, &c., in his examination as to his effects.

Quære, whether fraud committed before the Insolvent Act is fraud “within the meaning of the Act,” so as to make it a valid ground of opposition to a debtor's discharge, so long as he fully complies with all the other requirements of that Act.

The Insolvent Act does not require the petition in appeal to be signed by the insolvent or his attorney.

Notice must under that Act be served on the assignee of the day on which the petition will be presented to the Court.

The petition must be addressed to the Court, not to the Chief Justice: the latter is an irregularity,

which, however, may probably be corrected.

The neglect on the part of the assignee to file the papers on or before the day of presenting the petition is no reason for rejecting the appeal, though it may be a reason for enlarging the hearing, and proceeding against the assignee for his neglect or contempt.

Points not taken in the Court below are not open to parties before the Appellate Court.

Semble, that the more proper mode of raising technical objections to the proceedings in cases of this kind is to move a rule to set the proceedings aside, instead of urging the objections on the argument of the merits.—*Re Parr, an Insolvent*, 621.

Of vendor of goods subsequently to sale does not affect vendee's right.—See SALE OF GOODS.

Power of Judge to rescind order for substitutional service of attachment.—See SUBSTITUTIONAL SERVICE OF ATTACHMENT.

INSOLVENT.

Neglect to keep proper books of account, no ground for refusing discharge, when.—See INSOLVENCY, 4.

INSURANCE.

See AGENT.

INSURANCE COMPANY.

Not entitled to recover against Harbour Co., in name of insured, moneys expended in attempting to raise vessel lost by Harbour Co.'s negligence.—See HARBOUR CO.

INTENTION

Of parties to contract for sale of goods, to govern in determining question whether property passed.—See SALE OF GOODS.

INTERPLEADER.

See LEASE, 2.

IRREGULARITY.

Of fi. fa. goods on judgment of assets quando, in absence of sci. fa. or revivor.—See SETTING ASIDE PROCEEDINGS.

ISSUE BOOK.

Amendment of, by adding limited defence served after notice of trial, without prejudice to latter.—See AMENDMENT.

JOINT ACTION.

Of ejectment.—See EJECTMENT, 4.

JOINT EXECUTION.

Of deed by husband and wife, meaning of.—See DEED BY MARRIED WOMAN.

JUDGE.

Writ tested in the name of puisne.—See LIMITATIONS (STATUTE OF), 1.

Authority of, in Practice Court.—See PRACTICE COURT.

Power of, in Insolvency, to rescind his own order for substitutional ser-

vice].—See SUBSTITUTIONAL SERVICE OF ATTACHMENT.

Practice as to rescinding ex parte order of, in Chambers.].—See ESCAPE WARRANT.

Matter in discretion of Judge in Insolvency.].—See INSOLVENCY, 4.

JUDGMENT, (FINAL.)

See SETTING ASIDE PROCEEDINGS.

JUDGMENT, (FOREIGN.)

See EVIDENCE, 4, 7.

JUDGMENT RECOVERED.

Plea of.].—See PLEADING, 7.

JURAT.

Absence of venue in, does not vitiate indictment for perjury assigned on affidavit.].—See CRIMINAL LAW, 3.

JURY.

Proper direction to.].—See EVIDENCE, 3.

JUSTICES OF THE PEACE.

By 23 Vic. ch. 2, s. 28, authorized to take affidavits thereunder only in place in which they act as Justices.].—See CRIMINAL LAW, 3.

LEASE.

Lease under seal—Execution by agent unauthorized by deed—Adoption by principal—Evidence—Plaintiff bound by his notice of title.

Plaintiff's agent, without authority under seal, by deed leased to defendant for seven years certain land belonging to plaintiff.

The evidence shewed that the lease when signed was delivered to plaintiff, and that he several times requested the agent to go and see whether defendant had performed his covenants under the lease; that he had never objected to the lease, but he had been on the lot, and had had it surveyed after defendant took possession of it.

The jury found the plaintiff had adopted the lease, and re-delivered it as his deed :

Held, that their finding was right and that the lease was binding upon the plaintiff.

Plaintiff in his notice claimed by direct chain of title from the patentee of the Crown :

Held, that he could not rely, in answer to a lease of the premises set up by defendant, upon a forfeiture of such lease for non-performance of covenants; but he should have set out this forfeiture in his notice of title, if he wished to avail himself of it.—*Pettigrew v. Doyle*, 34.

(See this Case affirmed in Appeal, under Ejectment, 6.)

2. *Lease of lands—Mem. attached to lease—Contemporaneous delivery of chattels—Seizure of lessee's interest—Interpleader.*

Where A. demised to B. for a term of years, with a clause of forfeiture in case the term should be taken in execution, and contemporaneously with the lease delivered certain chattels into B.'s possession, upon the terms contained in a memorandum attached to the lease of the premises, signed by A., stating that "he agreed to allow the

use of the chattels to assist him to pay the rent and maintain his family," on an interpleader between A. and C., who had seized the chattels under an execution against B., *Held*, affirming the judgment of the County Court, 1st, that the memorandum formed no part of the lease, but operated only as a license to use, which was revocable.

2nd. That even if the chattels had been included in the lease, the chattels themselves could not have been sold, and that A. therefore was entitled to a verdict in the interpleader issue.

3rd. That at the most the interest which B. had in the chattels was incidental to the term and to the enjoyment thereof by B., and that therefore neither the goods themselves, nor B.'s interest therein, could be sold separately from the term.

4th. That if the term had been seized, such seizure, as working a forfeiture of the term, would have operated also as a forfeiture of all B.'s interest in the chattels; and therefore, *Held*, that upon all the grounds the verdict in favor of A. was right.

5th. That if it had been intended that only the defendant's special interest in the goods should be sold by the Sheriff under an execution, not the goods themselves, the interpleader should have been framed to meet such a case.—*Muckleston v. Smith*, 401.

Evidence of, for five years.]—See EVIDENCE, 1.

Non payment of rent during lease for twenty years]—See LIMITATIONS (STATUTE OF), 1.

See FIXTURES.

LEGAL REPRESENTATIVE.

May, under construction of Temperance Act of 1864, bring action, though the assault upon deceased resulted in death.]—See PLEADING, 1.

LIABILITY.

No evidence of original, on sale of goods]—See EVIDENCE, 5.

LICENSE.

Mem. attached to lease of land, allowing use of chattels, forming no part of lease, but amounting merely to revocable license to use.]—See LEASE, 2.

LIMITATIONS (STATUTE OF.)

Lease for twenty years—Nonpayment of rent during term—Statute of limitations—Fi. fa. tested in name of puisne Judge—Presumption of regularity.

Held, following *Doe d. Davy v. Oxenham*, 7 M. & W. 131, that where in the case of a lease for twenty years, the lessor permits the lessee to continue during the term without payment of rent, the Statute of Limitations does not begin to run against the lessor and those claiming under him until the determination of the lease, but that they may recover in ejectment at any time within twenty years thereafter.

A writ against lands was tested in the name of the then senior puisne Judge of the Court: *Held*, that the presumption was that the process of the Court was regular until the contrary appeared.—*Liney v. Rose*, 186.

2. *Ejectment—Mortgage without re-demise—Statute of Limitations—No presumption of payment.*

Where there is no re-demise to the mortgagor until default in payment of the mortgage moneys, and the land is vacant at the time of the execution of the mortgage, *Sembie*, that the mortgagee being under such an instrument deemed in possession of the land by operation of law, the presumption of payment of the mortgage moneys after the lapse of twenty years does not arise, even though the mortgagee has never made an actual entry, nor received any payment on account of the mortgage.

A. Wilson, J. dissentiente.

The mere fact that the mortgagee is barred by the Statute of Limitations of his remedy on the covenant for the recovery of the money will not establish a payment so as to re-convey the legal title to the mortgagor.—*Mahar and wife v. Fraser et al.* 408.

LIMITED DEFENCE.

In ejectment..]—See AMENDMENT.

LIQUIDATED DAMAGES.

See EVIDENCE, 2.

MAINTENANCE.

See EJECTMENT, 7.

MALICE.

Omission of allegation of, and of want of reasonable or probable cause,

in action for causing appearance to be entered without authority..]—See PLEADING, 6.

MANDAMUS.

Rule nisi for, in cause pending in County Court, cannot be issued by Practice Court.—See PRACTICE COURT.

MARRIAGE.

Evidence of, in dower..]—See SEISIN.

See BREACH OF PROMISE OF MARRIAGE.

MARRIAGE CONTRACT.

See MARRIED WOMAN'S ACT.

MARRIED WOMAN.

See MARRIED WOMAN'S ACT.

MARRIED WOMAN'S ACT.

Construction of the Married Woman's Act (Con. Stat. U. C. ch. 73)—*The term marriage contract or settlement explained.*

The purpose of C. S. U. C. ch. 73, was to preserve to a married woman for her own use, and as her own estate, all her own property which she had not disposed of expressly by a settlement, in like manner as if she had secured it by a settlement.

L., a few days before his marriage, executed to his intended wife a bill of sale of his furniture and household goods, and had it duly filed in the proper office. The bill

of sale recited the intended marriage, and that it had been agreed that the goods should be assigned for the purpose of making some provision for the support and maintenance of the intended wife, and purported to be made in pursuance of the said agreement and in consideration of 5s.:

Held, that the bill of sale was not a contract or settlement within the meaning of Con. Stat. U. C. ch. 73, sec. 1, but was a valid transfer of the goods to the intended wife before marriage, and in consideration of it, and that her title to the goods was therefore, when the marriage took place, protected by the Statute, notwithstanding her coverture.—*Lays and Wife v. McPherson*, 266.

MASTER (OF COURT.)

Excess of discretion.—See COSTS.

MEASURE OF DAMAGES.

Is the same, on contract to purchase land, whether under seal or parol.—See AGREEMENT FOR PURCHASE OF LAND.

MISDIRECTION.

See USURY—DISTRESS, 2.

MISJOINDER.

Of counts, can only be objected to, when.—See PLEADING, 5.

MISTAKE.

See MONEY HAD AND RECEIVED.

MORTGAGE

Effect of absence of re-demise.—See LIMITATIONS (STATUTE OF), 2.

Agreement for sale need not be in writing.—See MONEY HAD AND RECEIVED.

MONEY HAD AND RECEIVED

Sale of land—Mode of payment—Verbal agreement—Mistake—Right to recover back—Common counts—New trial.

Plaintiff, having bought a lot of land from defendant, agreed to pay him \$1,000 on a certain day, and to give a mortgage on the lot for the balance of the purchase money, the defendant agreeing to accept, in part payment of the latter, an assignment of a mortgage, held by plaintiff, for \$1,600, bearing 6 per cent. interest, which was to be sold to defendant at such a reduction as would pay him 8 per cent. On a calculation made as to what this reduction should be, plaintiff objected that it was too great, but defendant replied that if it turned out that there had been a mistake, he would rectify it. Defendant then credited plaintiff on his mortgage with the amount at which the other had been taken. It was subsequently ascertained that an error had been made in the calculation, to the extent of some \$200. Defendant sued plaintiff on his mortgage for the balance of the purchase money, less the sum for which he had given him credit, and though admitting there had been a mistake in arriving at that sum, he refused to correct it, and plaintiff paid him in full under pressure of the suit, but also under protest:

Held, that the agreement for the sale of the mortgage was not an agreement relating to the sale of land, requiring it to have been in writing.

Held, also, that plaintiff was entitled to recover back the \$200, for that it could not be considered a payment for the recovery of which he was estopped by what took place when he was sued; but that he could not recover on the common counts for money had and received. The Court, therefore, instead of entering a verdict for the plaintiff, as moved, pursuant to leave, granted a new trial, with liberty to plaintiff to amend his declaration.—*Carscadden v. Shore*, 493.

MUTINY ACT.

See CRIMINAL LAW, 1.

NAVIGABLE WATER.

See CROWN GRANT.

NEGLIGENCE.

In removing pier lights.—See HARBOUR CO.

NEW ASSIGNMENT.

See ASSAULT AND BATTERY.

NEW TRIAL.

On applications for, in criminal cases, duty of Court as to evidence under the Statute.—See CRIMINAL LAW, 2.

See EVIDENCE, 2, 3, 5—MONEY HAD AND RECEIVED—PAROL EVIDENCE.

NEW TRIAL REFUSED.

1. *Ejectment—Title by length of possession—Conflicting evidence—New trial refused.*

In ejectment, defendant claimed by length of possession by herself and ancestor. The evidence as to her possession being continuous was conflicting, and for part of the time it appeared to have been by such acts as keeping the key of the house, and leaving upon the premises one or two trifling articles, with an occasional return to the place. The whole case was left to the jury on the evidence, with a direction from the Judge that he could not say that there had not been a keeping of possession shewn by defendant. It also appeared that, in any event, the most the defendant could recover would be a very inconsiderable portion of the land in question, and there had already been two verdicts against her: The Court refused to protract the litigation by granting a new trial.—*Lewis v. Kelly*, 250.

2. *Action of crim. con.—Condonation—New trial refused.*

In an action of *crim. con.*, *Held*, that the fact of plaintiff having after verdict in his favor, from mere motives of compassion and consideration for their child, taken back his wife to live with him, was not such a condonation as would induce the Court to interfere on defendant's behalf, by granting a new trial.—*McMillan v. Jelly*, 702.

See CRIMINAL LAW, 2—USURY—FIXTURES.

NISI PRIUS.

Amendment at, of notice of title in ejectment.—See EJECTMENT, 9.

NONDIRECTION.

See USURY.

NON OBSTANTE VEREDICTO.

See CIRCUITY OF ACTION.

NON PROS.

Defendant not bound to sign judgment of, even where consented to by plaintiff, in case costs of discontinuance not paid.—See COSTS.

NONSUIT.

On motion to enter, pursuant to leave, Court will not consider whether there is scintilla of evidence.—See BREACH OF PROMISE OF MARRIAGE.

See COSTS.

NOTICE OF TITLE.

See LEASE, 1.—EJECTMENT, 6.

NOTARY.

Seal.

It is not necessary that the Notary who protests a note should use an official seal, or subscribe himself *in writing* a notary public: any seal which he declares in the protest to be his official seal is sufficient, and the placing of his signature before the *printed* words "Notary Public" amounts to an adoption of them.—*The Commercial Bank of Canada v. Brega*, 473.

NOTICE.

Of title—plaintiff bound by.—See LEASE, 1.—EJECTMENT, 1, 6.

OBSTRUCTION.

To highway.—See HIGHWAY, 1.

OMNIA RITE ESSE ACTA.

See PLEADING, 5.

ORIGINAL LIABILITY.

See EVIDENCE, 5.

PAROL EVIDENCE.

Written instrument—Parol evidence—New trial.

To an action on certain promissory notes and bills of exchange, and on the common counts, against defendant, as jointly liable with one H., defendant pleaded satisfaction and discharge of plaintiff's claim before action, by executing with H. an assignment of the joint effects to plaintiff and another for the benefit of creditors, and that plaintiff accepted this in full satisfaction and discharge of the causes of action in question. At the trial parol testimony was admitted of the agreement to accept the assignment in satisfaction and discharge:

Held, that it had been properly received, the effect of it being not to vary the terms of the writing, but merely to prove a collateral fact.—*Whitney v. Wall*, 474.

PAROL LICENSE.

Revocable.—See EASEMENTS.

PAYMENT.

Not established, so as to reconvey legal title to mortgagor, by mere fact that mortgagee barred, by limitation, of remedy on covenant for recovery of the money.]—See LIMITATIONS (STATUTE OF), 1.

PERJURY.

Will lie, though jurat of affidavit does not contain place where sworn.]—See CRIMINAL LAW, 3.

See CRIMINAL LAW, 4.

Sufficiency of indictment, merely alleging commission at trial on charge of larceny.]—See CRIMINAL LAW, 6.

PEWS.

Ejectment does not lie for.]—See EJECTMENT, 2.

Case proper remedy for disturbance of right to occupy.]—1B.

PIER LIGHTS.

Removal of, without reasonable notice.]—See HARBOUR Co.

PLEADING.

1. *Temperance Act of 1864, 27 & 28 Vic. c. 18, ss. 40, 41—By-law—Liability of innkeeper—Right to sue before prosecution for felony—Death of party assaulted—C. S. U. C. c. 78—Pleading.*

Declaration, that defendant by his servant wrongfully and in violation of the Temperance Act of 1864, in the Township of A., then and there being fully in force, furnished and

gave one W., while in defendant's inn, intoxicating liquors, whereby he became and was intoxicated, and while so intoxicated did assault the intestate, whereby he was immediately killed :

Held, on demurrer, that it was not necessary to allege a by-law of any municipal body as in operation in A. under the Temperance Act, but that the declaration could be sufficiently maintained under the 41st section of that Act, under which the action was brought, as being one of the express provisions in force everywhere, irrespective of local prohibition, without holding that *fully* in force meant that the *full* Temperance Act was in force in A., which would have required a by-law to have been first passed for the purpose. But,

Held, that the declaration was defective, in not shewing that W. drank to excess in the inn, which was necessary to fix the innkeeper with liability under the 40th sec. of the Act.

Held, also, (1) That the Temperance Act may be construed as giving the civil remedy, at any rate against the innkeeper, notwithstanding a felony may have been committed which has not been prosecuted for, although it does not, like the Imperial Act, contain any express provision to that effect. (2.) That, as the legal representative is by sec. 41 expressly authorized to sue for an assault upon the deceased, the action may under the construction of the Act be brought, though such assault has resulted in death. (3.) That this case was within the terms of C. S. C. ch. 78. the death of a person having been caused by such wrongful act, neglect or default, as would, if death had not ensued, have entitled the in-

jured party (by virtue of the Temperance Act) to maintain an action and recover damages in respect thereof; and that, therefore, defendant, who would have been liable by that Act, if death had not ensued, was still liable, notwithstanding the death of the person injured, and though caused under such circumstances as amounted to felony; and therefore the case being within that Act. *Semble*, that the allegations in the declaration, that the intestate was killed within twelve months next before action brought, and that plaintiff sued as well for the benefit of herself, as the wife of deceased, as for that of their infant children, were necessary allegations. — *McCurdy, Administratrix, v. Swift*, 126.

2. *Banks—Interest—Con. Stats. C. ch. 58, sec. 9—29 & 30 Vic. ch. 10, sec. 5—Pleading.*

To an action by the plaintiffs, a banking corporation, against defendants, on a promissory note, defendants in effect pleaded that the note was void under Con. Stats. C. ch. 58, sec. 9, in consequence of the taking by plaintiffs of more than seven per cent. interest from defendants: *Held*, on demurrer, plea bad; for that the effect of the 29 & 30 Vic. ch. 10, sec. 5, was not merely to relieve banking corporations from the pecuniary penalty mentioned in the Act referred to, but to save the security given for the moneys loaned from the forfeiture under that Statute. — *The Commercial Bank of Canada v. Cotton et al.*, 214.

(See this case affirmed in Appeal, under “*Banks*.”)

3. *Trespass, quare clausum fregit.—Highway—Right of owner of soil to eject—Estoppel—Pleading.*

Trespass quare clausum fregit, certain land of the plaintiff, in the township of Saltfleet, digging and making drains, &c., converting same into road or highway, and expelling plaintiff therefrom.

Second plea, land not plaintiff's.

Fourth plea, as to the digging and making drains for six years next before action brought, and maintaining the land during that period as a highway, and keeping plaintiff out of exclusive possession,—that before and during the period of six years before action brought, there was a highway over the whole of the said land, upon which statute labour had before and since been annually performed; that during said six years defendants, as such municipal corporation, had jurisdiction over said highway; that the soil and freehold of said land, being such highway, were during that period vested in the Crown, or in defendants under the Statute in that behalf, and defendants were thereby bound during said period to keep said highway in repair. The plea went on to deny the reservation of any rights in the soil by any individual, or the exclusive possession during said period by plaintiff, or any other person, but averred that the same had been used as a highway, and that the trespasses complained of were committed for the purpose of repairing the said highway.

Replications, to so much of the pleas as related to that portion of the trespasses committed since the commencement of an action of ejectment, brought by plaintiff against defendants for the same land, that defendants were estopped, by the recovery of judgment by default in that action and possession taken thereunder, from pleading said pleas:

Held, on demurrer, replications good, the exceptions thereto being sustained neither in fact nor law; in fact, because plaintiff did not bring ejectment for a highway; and in law, because, suing as plaintiff did sue, he rightly brought his action for so much land, though there was a right of way over it for the public, in accordance with the law as laid down in *Goodtitle v. Alker*, 1 Burr, 133.

Held, also, that the writ in ejectment not having described the property sued for as a highway, the recovery in that action would not have estopped the defendants from setting up, under a proper plea, that the land was a highway, and that they entered upon it for the purpose of repair; for that the recovery was not absolutely irreconcilable with the fact of the land having been all along a highway, the plaintiff, and not the defendants, being the owner of the soil, the public having the right of way over it, and therefore the right to enter and make repairs; but that defendants could not, after the recovery in ejectment, set up the pleas they had pleaded; the second, denying that the land was plaintiff's property, and the fourth not being confined to a mere assertion that the land was a highway, but distinctly alleging the soil and freehold of the land to be in the Crown, or in defendants; besides other averments quite opposed to plaintiff's having any right in the property, and therefore to his right to recover in ejectment, as he had recovered.—*Carscallen v. The Corporation of the Municipality of Saltfleet*, 219.

4. *Bond to execute a good and sufficient deed in law—Plea of execution of deed.*

To a declaration on a bond, whereby defendants' testator had bound himself or his heirs to "execute to plaintiff a good and sufficient deed in law" of the land in question, defendants simply pleaded that they, under a power in the will, had executed a deed of the land: *Held*, on demurrer, plea bad, for that by the words of the bond, the obligor had bound himself to convey the land to plaintiff, and it was no answer to say that defendants had executed a deed, without shewing that they had conveyed the land to him; and, also, because it was not shewn that the heirs were parties to the deed, and that the defendants had therefore executed a proper deed.—*Wiseman v. Williams et al.*, executors of *Williams*, 262.

5. *Absconding Debtors Act (C. S. U. C. ch. 25)—Action by Sheriff—Attachment—Conversion by co-partner of joint property—20 Geo. II., ch. 37—Pleading.*

Held, on exceptions to the first count of the declaration, which was by a Sheriff under the 25th section of the Absconding Debtors Act (C. S. U. C. ch. 25) against the defendant, a partner of the absconding debtor, for converting the joint property, that the count was bad; first, because it did not state that the plaintiff sued under the provisions of that Act, as required by the 26th section thereof, though it did state that he had, in compliance with the 25th section, obtained the order of a Judge to bring the action; and secondly, because it was not shewn that notice of the attachment had been served upon defendant, or that the goods had been attached or seized by the former Sheriff, during whose

tenure of office the attachment had issued, or by the plaintiff, his successor in office, the averment being merely, that defendant, having property in his possession (which the Sheriff might have seized, but did not seize, whilst the property was liable to seizure), converted it to his own use.

Semble, that the fact of the defendant, if sued, being limited under the Statute in his defence to matters that would avail him against the absconding debtor at the date of the writ of attachment, refers to the prosecution of claims arising before the issue of the writ. But *Held*, that the count was not objectionable for not stating that the attaching creditor had proved his debt before judgment, or filed an affidavit of the sum justly due before the issue of execution, for that the 9th section of the Act expressly directed that this should be done, and the maxim *omnia rite esse acta*, &c., must be applied to proceedings in the Superior Courts.

Held, also, that it was not necessary to allege that the real and personal property, &c., attached, had proved insufficient to satisfy the execution, or what return the Sheriff had made to the writ, as, it appearing that the suit had been brought by order of a Judge, it must be presumed that he was satisfied, as he must have been under the Statute, as to the insufficiency of the goods, or he would not have granted the order.

Semble, that inasmuch as under the law, as now settled, there may be a conversion by one co-partner of the joint property, it was not necessary to allege more than the fact of conversion, leaving it to be shewn by the evidence that there was such a destruction of the joint property

as would make it between persons so situated a conversion.

Held, also, that it must be assumed, if there was any Sheriff having the execution of the writ in this cause, it was the plaintiff, who had been authorized by the order of a Judge under the Statute to bring this action, the Statute contemplating that the Sheriff for the time being shall sue for demands and rights of action attachable under it; and the 20th Geo. II., ch. 37, providing that outgoing Sheriffs shall turn over to their successors all such writs as shall remain in their hands unexecuted, who shall duly execute and return the same.

The plaintiff having demurred merely to the plea to the first count of the declaration, *Held*, that defendant could not except to the declaration on the ground of misjoinder of counts, as that objection could only arise on demurrer to the whole declaration.—*Taylor (Sheriff) v. Brown*, 387.

6. *Entering appearance without authority—Omission of allegation of malice and want of reasonable or probable cause—Costs—Pleading.*

Plaintiff declared against defendant for having caused an appearance to be entered for the defendants in an action of ejectment, brought by plaintiff against them, to recover possession of certain land assigned to plaintiff under process issued in an action of dower against this defendant, alleging that he had done so wilfully, wrongfully, and without the consent, knowledge or authority of the defendants, but not charging *malice or want of reasonable or probable cause* :

Held, on demurrer, that the declaration was bad on this ground.

Semble, that defendant and his attorney would, on such a declaration, be liable to the defendants in the ejectment suit; and that (the defendants therein being worthless) he would also be liable to the plaintiff for the costs of that suit, on a summary application to the Court made therein.—*Fisher v. Holden*, 395.

7. Judgment recovered—Estoppel.

Trespass for breaking and entering the south forty acres of the east-half of lot twenty-two. *Plea*. Judgment recovered by the now defendant against the now plaintiff and another in a former action of trespass brought by the now defendant for breaking and entering that part of the half-lot lying north of the south forty acres, and averring that the trespass now complained of and the trespass complained of in the former action were committed on the same piece of ground; which piece the now plaintiff had contended in the former action formed part of the south forty acres, but which the jury in that action had found to lie north of the south forty acres: *Held*, a good plea by way of estoppel.—*Leinster v. Stabler*, 532.

8. Fence-viewer's Act (C. S. U. C. ch. 57)—Non-compliance with award — Restriction to statutory remedy—Pleading.

The declaration was against the defendant as owner of a lot adjoining the plaintiff's land, alleging the existence of a large quantity of surplus water upon both lots; that both parties disputed as to their respective rights and liabilities under the Fence-viewer's Act (C. S. U. C, ch. 57), and steps were thereupon taken to procure an

award under said Act, which was accordingly done, and an award made in the presence and with the assent of both parties. The declaration then went on to recite the award *verbatim*, which directed two ditches to be made by the parties, one by each, and concluded thus, "said ditch to be made before the 1st of October, 1865." Plaintiff then averred performance of the award on his part, but a neglect and refusal to perform it on the defendant's part, and claimed damages for such neglect and refusal: *Held*, on demurrer, that the declaration was not bad as failing to disclose a case which gave the fence-viewers jurisdiction, which it sufficiently did, but that it was bad as setting out an award which did not fix the time each party should have within which to perform his share of the ditching, or direct where such ditching should be made; and also, for not shewing that a demand in writing had been made on the defendant to perform the award, the non-compliance with which would have entitled the plaintiff under the Act to have completed the ditch and sued for the price fixed, instead of bringing an action for damages, which could not be maintained.

The eleven sub-sections of section 16 of the above Act refer to ditches and watercourses as well as to fences.—*Murray v. Dawson*, 588.

See REPLEVIN—INSOLVENCY, 2—EXECUTOR DE SON TORT—AGENT—HARBOUR CO.—CIRCUIT OF ACTION—ASSAULT AND BATTERY—EQUITABLE PLEADINGS, 1.

POLICY

[Not under seal.]—See AGENT.

POSSESSION.

Presumption, where possession for upwards of 30 years in accordance with deed of land.—See DEED OF MARRIED WOMAN.

Effect of conflicting evidence as to tenith of, on application for new trial.—See NEW TRIAL REFUSED, 1.

Wrongful continuance in, by landlord, beyond reasonable time after distress, renders him liable in trespass.—See DISTRESS, 2.

POWER.

Delegation.—See EJECTMENT, 8.

PRACTICE.

As to rescinding ex parte order made in Chambers.—See ESCAPE WARRANT.

In Insolvency.—See INSOLVENCY, 4.

Form of rule absolute in trover for solicitor's docket, on motion to set aside verdict for excessive damages.—See TROVER.

As to drawing up rules nisi in different cases.—See ESCAPE WARRANT.

See COSTS — EJECTMENT, 6 — AMENDMENT — SETTING ASIDE PROCEEDINGS.

PRACTICE COURT.

Authority of Judge in Practice Court.

Held, on the authority of In re Sams v. The Corporation of Toronto, 9 U. C. 181, that a Judge sitting in Practice Court has no authority to issue a rule nisi for a mandamus,

in a cause pending in the County Court.—Crysdale v. Moorman, 218.

PREFERENTIAL ASSIGNMENT.

In 1857, no ground for refusing discharge under Insolvent Acts.—See INSOLVENCY, 4.

PRESENTMENT.

Of promissory note at any time within period fixed by Statute of Limitations and before action, sufficient as between holder and maker both in Ontario and Quebec.—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PRESSURE.

Right to recover back money paid under pressure of suit.—See MONEY HAD AND RECEIVED.

PRESUMPTION.

Of proper execution of deed.—See DEED BY MARRIED WOMAN.

Of regularity in cases of fi. fa.—See LIMITATIONS (STATUTE OF), 1.

Of innocence.—See BREACH OF PROMISE OF MARRIAGE.

Of payment, does not arise after lapse of 20 years, where no re-demise in mortgage.—See LIMITATIONS (STATUTE OF), 2.

As to place where affidavit sworn.—See CRIMINAL LAW, 3.

PRIORITY.

Of execution to attachment.—See INSOLVENCY, 3.

PROBATE.

Renunciation of, by one of two or more executors, peremptory and irrevocable—See EXECUTOR.

PUBLIC OFFICERS.

Presumption in favor of.—See DEED BY MARRIED WOMAN.

PURCHASE OF LAND.

By execution creditor under fi. fa. against debtor.—See EVIDENCE, 6.

RAILWAYS AND RAILWAY COMPANIES.

Railway Co.—Forcible removal by conductor—Liability of Co. for assault—Remote damages.

Where the conductor of a Railway Company, forcibly and without excuse for so doing, removes from a train a passenger who has paid his fare, he is liable for the assault, and the doctrine of *respondet superior* applies to the Company. But where, in the course of such removal, and while in the act of leaving the car, plaintiff slipped and was injured, *Held*, that defendants were not liable for the injuries sustained by him, as his removal was not the proximate, but the remote cause of the accident, and the damages awarded were, therefore, too remote.—*Williamson v. The Grand Trunk Railway Co.*, 615.

REASONABLE OR PROBABLE CAUSE.

Omission of allegation of want of, and of malice, in action for causing

appearance to be entered without authority.—See PLEADING, 6.

REDEMISE.

Effect of absence of, in mortgage.—See LIMITATIONS (STATUTE OF), 2.

REGISTRATION.

Defects in registration of titles in the County of Hastings—9 Vic. ch. 12, 10 & 11 Vic. ch. 38.

Plaintiffs claimed through A., whose ancestor in 1833 took by conveyance from B., who took by conveyance from the patentee. These two conveyances were defectively registered. The defendant claimed title through the purchaser from the heir-at-law of B., whose deed was registered, as also that from patentee to B. in 1857:

Held, that plaintiff's title, if considered unregistered, must prevail, but if defectively registered, such defect was removed by subsequent re-entry under 9 Vic. ch. 12, and 10 & 11 Vic. ch. 38; that this was retroactive, and the plaintiffs had therefore a good registered title.—*Campbell et al. v. Fox*, 542.

Effect upon grantor and subsequent grantee, during grantor's life, of non registration of deed barring estate tail.—See ESTATES TAIL.

Effect on purchaser for valuable consideration, under the General Registry Act, of non-registration of prior deed.—See ESTATES TAIL.

REGULÆ GENERALES.

As to order of business in Court.—See page 44½.

REGULARITY.

Of fi. fa. lands, where record shewed no goods, the fi. fa. goods irregular.]
—See SETTING ASIDE PROCEEDINGS.

Presumption of, in case of fi. fa.]
—See LIMITATIONS (STATUTE OF),
1.

RELEASE.

Of dower, where husband had no estate in land granted by him.]—See DOWER.

REMOTE DAMAGES.

See RAILWAYS AND RAILWAY COS.

RENDER.

Of prisoner by bail.]—See ESCAPE WARRANT.

RENT SECK.

May be distrained for.]—See DISTRESS.

RENUNCIATION.

Of probate, by one of two or more executors, peremptory and irrevocable.]—See EXECUTOR.

REPLEVIN.

Replevin—Divisibility of pleadings—Actual user of goods—Exemption from seizure—Duplicity—Pleading.

Replevin is maintainable as the law was before the Replevin Act, and in a far more comprehensive manner since that Act, for goods taken which were not properly seizable; and that, though goods

properly seized be replevied with the others.

This action is divisible, and therefore a plaintiff may plead a plea which only goes to part of the cause of action.

The actual user of goods, of whatever kind, exempts them from seizure either by distress or otherwise, and whether, in the case of distress, there be a sufficiency or not of other goods on the premises liable therefor.

A plea was held not objectionable, on the ground of duplicity, for stating that the articles distrained and replevied were beasts of the plough and an implement of husbandry, and also that they were in actual use of the plaintiff; because the articles were not absolutely privileged, but only *sub modo*. and to constitute an absolute privilege it was necessary further to have alleged that there was a sufficiency of other goods on the premises liable to be distrained; but, as that could not be alleged in this case, plaintiff was entitled to rely on the actual user at the time of distress, which exempted them as fully as if there had been other goods liable to seizure.

A plea, which alleged that there were other articles on the premises besides the privileged articles, held good, as affording a sufficient answer to the seizure.—*Miller v. Miller*, 226.

RESCINDING JUDGE'S ORDER.

See ESCAPE WARRANT.

RULES NISI.

Practice in drawing up, as to materials moved on.]—See ESCAPE WARRANT.

SALE.

Of land for taxes.—See TAXES.

SALE OF GOODS.

Weight not ascertained—Delivery at future time—Insolvency of vendor—27 & 28 Vic. ch. 17, sec. 8, sub-sec. 2—Chattel mortgage to Bank—Validity though not filed—C. S. C. ch. 54, sec. 4.

On the 13th September, 1866, S. agreed to deliver on account of K. at a railway station, when wanted, 600 boxes factory cheese, at a certain rate per pound, and to keep the same insured until wanted. The weight of cheese had not at this time been ascertained; in fact, the whole quantity had not been manufactured. Subsequently two warehouse receipts, dated respectively 21st September and 9th October, were given to K., the one for 330 and the other for 230 boxes, signed by S. and specifying the weight of the cheese. On the 22nd of October, K. executed a mortgage to plaintiffs on 400 boxes of cheese purchased by him from S. on or about the 13th of September, and then in the curing house of S., to secure the payment of moneys advanced to him by plaintiffs upon the security of part of the cheese. This mortgage was not filed. S. became insolvent on the 19th October following, and K. became aware of it on the following day. The plaintiffs replevied 341 boxes of cheese:

Quære, whether the property in the cheese passed to K. on the 13th September; but if it did not, because the weight had not been then ascertained, that objection was removed on the 21st September, as the receipts of that date specified the weight. But, *Held*, that the fact that

the cheese was not to be delivered until a future time, when K. wanted it, and that S. was to keep it insured in the meantime, did not prevent the property passing; for it is the intention of the parties to the contract which is to govern in such cases.

Held, also, that even if the property did not pass before the 21st of September, in consequence of the weight not having been before then ascertained, the subsequent insolvency of S. did not affect K.'s right respecting it; for that the only portion of the Insolvency Act of 1864 applicable to the case (sec. 8, sub-sec 2) did not in fact apply, as there was no evidence here of obstructing or injuring creditors, but the contrary, the property having been sold at its full value; but, even if the case were within the operation of that clause of the Act, the contract would be voidable only under the order of a competent tribunal, and no such order had yet been made, and would only be made upon such protective terms to the person from actual loss or liability as the Court might direct.

Held, also, that the mortgage to the plaintiffs was valid, having been taken "by way of additional security for a debt contracted to the Bank in the course of its business," and therefore within C. S. C. ch. 54, sec. 4; that it could not be impeached by any one for want of filing but an opposing creditor of K., and that as S. could not impeach it, neither could the defendant, his assignee in insolvency.—*The Bank of Montreal v. McWhirter*, 506.

No evidence of original liability.
See EVIDENCE, 5.

SALE OF LAND.

See MONEY HAD AND RECEIVED.

SEAL.

Notary need not have an official seal.]—See NOTARY.

SCINTILLA OF EVIDENCE.

The Court will not consider whether there is, on motion to enter nonsuit pursuant to leave.]—See BREACH OF PROMISE OF MARRIAGE.

SEALED INSTRUMENT.

Estate conferred by.]—See TRESPASS QUARE CLAUSUM FREGIT.

SECONDARY EVIDENCE.

Of Sheriff's deed.]—See EJECTMENT, 1.

SECRET TRUST.

In favour of parties ineligible to hold pews, does not, at law, invalidate deed of such pews.]—See EJECTMENT, 2.

SEISIN.

Dower — Seisin — Marriage — Evidence.

In an action of dower the evidence of seisin was the defendant's declaration to a third party that the husband was to convey the land in question to him, and his subsequent declaration that he had conveyed to him in fee, together with a memorial of this conveyance executed by the defendant. There was also the fact that the husband had been off and on the land before the conveyance: *Held*, sufficient.

General reputation is *primâ facie*

evidence of marriage in an action of dower.

In this case, irrespective of general reputation, there was evidence that the defendant had told a third party he was to give the defendant's husband (his brother) \$100 to bring out his wife and children from Scotland, who was to execute to him in return a deed of the land in question. Defendant afterwards said he had received the deed, and that the wife would bar her dower on her arrival in this country. On her arrival defendant received her into his house as his brother's wife, and recognized her as such until his brother's death: *Held*, good *primâ facie* evidence of marriage.

Semble, that the recognition by defendant of demandant as his brother's wife would of itself alone have been sufficient *primâ facie* evidence of their marriage, as against him, in this action.—*Beatty v. Beatty*, 484.

SEIZURE.

Seizure of chattels of landlord in possession of lessee of land.]—See LEASE, 2.

SETTING ASIDE PROCEEDINGS.

Assets quando—Final judgment—Regularity and irregularity in writs against lands and goods—Suggestion without leave—Debt and Damages—Practice.

The plaintiff, as official assignee, sued defendant, as administrator, on a promissory note payable to W. or bearer. Defendant pleaded *plene administravit præter goods*

not sufficient to satisfy a judgment outstanding. Plaintiff replied, confessing the plea, and prayed judgment and his damages, &c., of assets *quando*. The pleadings were thus entered on the roll, together with a second prayer of judgment for plaintiff's debt, &c. Then followed the judgment as for damages, and a suggestion that intestate died seised of lands, &c., and a prayer that the amount recovered might be levied of the lands. A *fi. fa.* against goods issued on 19th February, as for damages recovered, which was returned no goods, and on the 20th February a *fi. fa.* lands issued, which spoke merely of the amount recovered. There had been no order of reference to the Master to ascertain the amount, nor any assessment by a jury, nor any *sci. fa.* to enquire as to goods.

Held, on application to set aside the judgments and writs, that the judgment was a final judgment, and that no reference or assessment was requisite.

Held, also, that the writ against goods, on a judgment of assets *quando*, was irregular, there having been no writ of *sci. fa.*, or revivor; but that notwithstanding the writ against lands was not irregular, as the record shewed there were no goods.

Held, also, that the proceedings on the suggestion were regular, without any leave to enter such suggestion or judgment thereon; and that the discrepancies between debt and damages were mere defects in form, and amendable.

Quære, whether any suggestion of lands at all was requisite.—*Mason (official assignee) v. Babington (administrator)*, 149.

SETTLEMENT (MARRIAGE).

See MARRIED WOMAN'S ACT.

SEVERAL POSSESSION.

See EJECTMENT, 4.

SHERIFF.

Action by, under Absconding Debtors Act.—*See* PLEADING, 5.

Conveyance by, out of office, in completion of sale made in office.—*See* EJECTMENT, 7.

SOLICITOR'S DOCKET.

Trover for.—*See* TROVER.

SPECIAL CONDITIONS.

See EVIDENCE, 3.

STATUTE LABOR.

Insufficient evidence of, to establish highway.—*See* HIGHWAY, 1.

STATUTE OF FRAUDS.

See EVIDENCE, 5.

STATUTE OF USES.

See EJECTMENT, 7.

STATUTES (CONSTRUCTION OF).

18 *Eliz. ch. 5, s. 4.*—*See* CRIMINAL LAW, 5.

2 *Wm. & M.*, sess. 1, ch. 5, sec. 5.]—See DISTRESS, 1.

29 *Ch. II. ch. 3.*]—See EVIDENCE 5.

1 *Anne*, st. 2, ch. 6, and 5 *Anne*, ch. 9.]—See ESCAPE WARRANT.

4 *Anne*, ch. 16, ss. 9, 10.]—See DISTRESS, 1.

4 *Geo. II. ch. 28*, s. 5.]—See DISTRESS, 1.

20 *Geo. II. ch. 37.*]—See PLEADING, 5.

9 *Geo. IV. ch. 3.*]—See TAXES.

1 *Wm. IV. ch. 2.*]—See DEED BY MARRIED WOMAN.

9 *Vic. ch. 12*, 10 & 11 *Vic. ch. 38.*]—See REGISTRATION.

11 & 12 *Vic. ch. 12 (Imp. Act).*]—See CRIMINAL LAW, 2.

14 & 15 *Vic. ch. 99. sec. 11 (Imp. Act).*]—See EVIDENCE, 4.

22 *Vic. ch. 35 s. 2.*]—See DEED BY MARRIED WOMAN.

Con. S. C. ch. 58, s. 9.]—See PLEADING, 2—BANKS.

Ch. 78.]—See PLEADING, 1.

Ch. 100.]—See CRIMINAL LAW, 1.

Con. Stats U. C. ch. 9, sec. 2.]—See ESCAPE WARRANT.

Ch. 16, sec. 1.]—See EXECUTOR.

Ch. 22, sec. 222.]—See EJECTMENT, 9.

Ch. 22, sec. 269.]—See EJECTMENT, 7.

Ch. 25.]—See PLEADING, 5.

Ch. 27, sec. 12.]—See AMENDMENT.

Ch. 54, sec. 4.]—See SALE OF GOODS.

Ch. 54, sec. 313.]—See HIGHWAY, 1.

Ch. 57, sec. 16, sub-sec. 1, 11.]—See PLEADING, 8.

Ch. 73.]—See MARRIED WOMAN'S ACT.

Ch. 74, sec. 5.]—See EJECTMENT, 3.

Ch. 85, sec. 11.]—See DEED BY MARRIED WOMAN.

Ch. 91.]—See EASEMENTS.

Ch. 98.]—See CRIMINAL LAW, 2.

23 *Vic. ch. 2, sec. 35.*]—See CROWN GRANT.

Ch. 2, sec. 28.]—See CRIMINAL LAW, 3.

Ch. 24, sec. 1.]—See EVIDENCE, 7.

24 *Vic. ch. 40, sec. 19.*]—See DOWER.

27 & 28 *Vic. ch. 18, secs. 40, 41.*]—See PLEADING, 1.

Ch. 17, sec. 8, sub-sec. 2.]—See SALE OF GOODS.

Ch. 17, sec. 11, sub-sec. 2.]—See INSOLVENCY, 1.

29 *Vic. ch. 18, sec. 2.*]—See INSOLVENCY, 2.

29 & 30 *Vic. ch. 10, sec. 5.*]—See PLEADING, 2—BANKS.

29 & 30 *ch. 51. sec. 254.*]—See CRIMINAL LAW, 5.

30 *Vic. ch. 10, sec. 5.*]—See USURY.

STATUTORY CONVEYANCE.

Effect of, where no mention of easements, &c.]—See EASEMENTS.

STAY OF PROCEEDINGS.

On judgment in ejectment before hab. fac. poss. executed, where defendant meantime acquires title.]—See EJECTMENT, 4.

SUBSTITUTIONAL SERVICE OF ATTACHMENT.

Insolvency—Judge's power to rescind his order for.

"A Judge in Insolvency has power to rescind an order made by him for substitutional service of a writ of attachment; and in this case the Court, on appeal, refused to interfere with an order for such rescission.—*Eaton v. Shannon*, 592.

SUGGESTION.

Regularity of proceedings on, though no leave to enter.—See SETTING ASIDE PROCEEDINGS.

SURPRISE.

No ground of, that prisoner had no knowledge of evidence to be produced against him.—See CRIMINAL LAW, 2.

TAXES.

Sale of land—9 Geo. IV. ch. 3.

Held, following the current of decisions from *Doe d. Bell v. Reaumur et al*, 3 O. S. 243, that where taxes had been paid on lands to the Treasurer of the District where the lands lay, and a receipt obtained therefor, the subsequent sale of the lands by the Sheriff, as in arrear for taxes, in consequence of the Treasurer having omitted to credit the payment on the lot, was void, although the Treasurer had returned the lands as so in arrear.

Held, also, that such sale was equally void, where the taxes had, in accordance with 9 Geo. IV. ch. 3, been paid to the Treasurer of the District in which the owner resided.]—*Myers v. Brown*, 307.

TEMPERANCE ACT OF 1864.

See PLEADING, 1.

TESTATOR.

Represented by his executor's executor.—See EXECUTOR.

TERM OF YEARS.

Sale of reversion in, under fi. fa. on a judgment against executor de son tort, valid as against rightful administrator.—See EXECUTOR DE SON TORT.

TIME (COMPUTATION OF).

See DISTRESS, 2.

TRESPASS.

Maintainable for wrongful continuance in possession by landlord beyond reasonable time.—See DISTRESS, 2.

TRESPASS QUARE CLAUSUM FREGIT.

Sealed instrument—*Estate conferred*—*Trespass quare clausum fregit*—*Right to maintain*.

By an instrument under seal between plaintiff and defendant H., H. agreed to allow plaintiff the use of his grist and saw-mills for five years, on condition that each party should pay half the repairs upon the mills for the term named; the saw-mill and books to be under the control of H., and the grist-mill chiefly under the control of plaintiff. The agreement then stated that H. allowed plaintiff the use of a dwelling-house and barn near the mill, &c.; and each party was to pay half the taxes "on the property above named during the term of

five years": *Held*, that plaintiff took a legal estate under the instrument in the whole of the property for the period of five years, subject to the rights to be exercised over it by H., as well as to the other conditions of the agreement, and that plaintiff could therefore maintain trespass against two others of the defendants who entered under H. and expelled plaintiff from the dwelling-house.—*Kellington v. Herring et al.*, 639.

See PLEADING, 3.

TRIAL BY PROVISIO.

Defendants entitled to costs of, notwithstanding rule to discontinue issued by plaintiff.—See COSTS.

TROVER.

Solicitor's docket—Excessive damages—Form of rule absolute.

In trover, for the conversion of a solicitor's docket and papers, containing entries and evidences of certain bills of costs against different parties, the jury gave a verdict for \$2500. On motion to set this verdict aside as excessive, the Court made a rule that upon defendant delivering up to plaintiff the book and papers in question, if the plaintiff chose to accept them, the verdict should be reduced to one shilling, and defendant pay the costs of all proceedings, to be taxed on the Superior Court scale, a certificate for which to be granted by the Judge who tried the cause, if necessary; but that if plaintiff should prefer proceeding with the action, then he should proceed merely for such special damage as he might claim to have sustained,

with liberty to amend his declaration accordingly, and to proceed at the risk of all costs.

In such an action the measure of damage is not the value of the book, as a mere book, but what it is worth to the plaintiff irrespective of such value.—*Doyle v. Eccles*, 644.

TRUST.

See SECRET TRUST.

USE AND OCCUPATION.

Evidence.

In an action for use and occupation the evidence offered was, that one V. conveyed the land in question to plaintiff, as trustee, but the trusts declared by the deed were repudiated, and the deed destroyed by plaintiff, under the belief that he had thereby extinguished the trust. Plaintiff made no claim to the land, nor did anything until several years afterwards, when he forbade defendant paying rent to any one until a Chancery suit, then pending, should be settled. During his interview on this occasion with defendant, the latter's wife had in her hand a lease from another party, under which the rent was payable, and under which defendant held the land. Defendant said he would deposit the money in the bank until the suit was settled, and would then pay to plaintiff, if he was the proper person to receive. Nothing further appeared to have occurred for about five years, when plaintiff applied to defendant for rent, whereupon defendant answered that he had it not then, but would pay part when he had got it; and on a subsequent and similar application defendant replied that

he would pay part of it if he had it: *Held*, that the rent spoken of was the rent payable under the lease, not as rent for the occupation under plaintiff, for it did not appear that plaintiff had ever asserted title to the land as landlord; that the evidence pointed to defendant's willingness to attorn to the right claimant of the land, not to the fact that he was occupying under plaintiff; and that the promise was to pay the rent under the lease referred to at the first interview, and was not therefore evidence to shew an occupation under plaintiff, but an assertion of holding by deed, which by the Statute precluded this form of action.

Semble, that if plaintiff had at that time asserted title in himself, or had claimed the land, what passed would have been evidence of attornment; but that if defendant had attorned this action would not lie.—*Thompson v. Bennett*, 380.

USER.

Actual user of any goods exempts from seizure.—See REPLEVIN.

USURY.

Action on pro. note—Plea of usury—Admissibility of evidence—Misdirection—Usury established before 30 Vic. ch. 10, s. 5—New trial refused.

On the trial of an action on a pro. note, brought by the plaintiffs, a banking corporation, and to which defendants pleaded usury, consisting in the plaintiffs' making the note payable at a distance from the place of discount, and thereby securing a larger rate of interest, in

the shape of commission, than they were legally entitled to, the plaintiffs' agent was asked by the defendants, in cross-examination, whether during the time he was in P. (the place of discount) he had directed or caused any other note to be made payable at any other place than P.:

Held, that the question was admissible.

Held, also, that the jury not having been directed that the note sued on, being the last of a series which had always been made payable as this one was, was not tainted with usury, because made payable at a distance from P., was not misdirection, but nondirection at most, which was only ground for a new trial when it produced a verdict against evidence, which had not been the case here.

Held, also, that the defence of usury having been pleaded and established against the plaintiffs, before the passing of 30 Vic. ch. 10, s. 5, was not in any way affected by that Statute, and a new trial was therefore refused.

The distinction between vested rights and mere modes of procedure pointed out.—*The Bank of Montreal v. Scott et al.*, 358.]—

See PLEADING, 2.

VALIDITY.

Of deed good on its face, though void in equity.—See EJECTMENT, 2.

VARIANCE.

Between amounts in judgments and fi. fas.—See EJECTMENT, 1.

Between declaration and agreement produced.—See EVIDENCE, 2.

VENDEE.

After grown crops raised by, protected from seizure under execution against fraudulent vendor.]—See FRAUDULENT CONVEYANCE.

VENDOR, (OF GOODS.)

Insolvency of, subsequently to sale, does not affect vendee's right.]—See SALE OF GOODS.

VENUE.

Absence of, in jurat of affidavit on which perjury assigned, does not vitiate indictment for perjury.]—See CRIMINAL LAW, 3.

VESTED RIGHTS.

Distinction between and mere rights of procedure.]—See USURY.

VOLUNTARY ESCAPE.

From Sheriff, of prisoner on mesne process.]—See ESCAPE WARRANT.

WAIVER.

Ejectment — Demise — Forfeiture — Waiver — Estoppel.

Plaintiff, by indenture, agreed with defendant to convey to him certain land, the right to purchase which had been assigned by defendant to him, on payment by defendant of certain instalments of money, and plaintiff covenanted that defendant should occupy the land until default in payment of any one instalment. After default made plaintiff joined with defendant in a

reference to arbitration of all matters then in difference between them, and the arbitrators by their award postponed the date of payment as to which defendant had been in default, and the jury found that before the day so fixed defendant had made a tender of the amount:

Held, that the instrument executed by plaintiff created a demise, or a redemise, in favor of defendant, which could have been absolutely avoided by plaintiff on the default made by defendant; but that the reference to arbitration, after the default made, had either operated as a waiver of it, or had had the effect of postponing the time of payment, before the expiration of which time tender had been made; and that in either view plaintiff could not maintain ejectment against defendant. *Quere*, whether the reference to arbitration and the postponement above mentioned would not constitute defendant a tenant at will, and so entitle him to a demand of possession before action.

Suing on an award will estop a party from denying the authority of the arbitrators.—*Black v. Allan*, 240.

Of presentment, by endorser, not binding on maker.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

By parol, of condition in Policy.]—See AGENT.

WEIGHT.

Not ascertained, of goods sold.]—See SALE OF GOODS.

WILL.

Construction of.]—See EJECTMENT, 8.

WITHDRAWAL.

Effect of withdrawal, by leave of Judge, of judgment offered in evidence.—See EVIDENCE, 6.

WITNESS.

In case of joint action of ejectment against two parties in possession, and their occupation several, one not thereby

rendered competent witness for the other.—See EJECTMENT, 4.

WORDS (MEANING OF).

“In arms,” under C. S. U. C. ch. 98.—See CRIMINAL LAW, 2.

WRITTEN INSTRUMENT.

See PAROL EVIDENCE.

ERRATA.

On p. 126, in lieu of “McCurdy v. Swift, administratrix,” read McCurdy, administratrix, v. Swift.

On pp. 282, 285, in 5th line of head-note and 2nd line of judgment, in lieu of “33” read 313.

On p. 148, in the award of judgment, in lieu of “Rule absolute to enter nonsuit,” read Rule absolute to *set aside* nonsuit.

On p. 401, in 5th line of head-note, in lieu of “M.” read A.

On p. 493, in 4th line of head-note, in lieu of “defendant” read *plaintiff*.

On p. 652, after “certainly,” on the last line of the page, read “never was prepared to do, for he was bound to pay the \$1000”; and omit the same at the head of p. 657.

